The Taxation of International (non-resident) Sportspersons in South Africa

A critical analysis of the relevance of the OECD Model article 17 in Double Tax Agreements from a South African perspective and the misalignment of this article in South African DTAs (in force at 1 June 2008) when compared against the final withholding tax on the gross earnings of non-resident sportspersons performing in South Africa

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ABSTRACT

This thesis tests, firstly, the relevance of the OECD Model article 17 (the sportsperson article). Secondly, and accepting the current format of the sportsperson article in South African Double Tax Agreements (DTAs), the withholding tax applied to sportspersons performing in South Africa is analysed against the sportsperson article to determine whether these are appropriately aligned.

The interpretational rules applicable to fiscal legislation in South Africa provide the methodology applied to the analysis of the withholding tax on sportspersons and the applicable DTA articles. Comparative analyses were conducted on all the South African DTAs in force at 1 June 2008 against the OECD, UN and USA Models. The OECD Model provides the core commentary as it is the general basis for most South African DTAs. Substantive analyses were conducted on the DTA articles of "taxes covered" (OECD Article 2); sportspersons (OECD Article 17) and exchange of information (OECD Article 26).

The scope of the withholding tax, both as regards persons and income, was found to be wider than that of the South Africa DTA sportsperson articles. This misalignment renders the withholding tax inapplicable in many cases when applied to a resident of a Contracting State. Naturally the misalignment has no influence on sportspersons from States that have not concluded a DTA with South Africa.

The misalignment has also been replicated in the concessionary legislation promulgated for the 2009 FIFA Confederations Cup and 2010 FIFA World Cup in South Africa. As South Africa has not concluded DTAs with the bulk of the potential qualifying countries for the 2010 FIFA World Cup, the possibility of double taxation for sportspersons, support and auxiliary staff is increased.

The difference in scope between the DTAs and the withholding tax is also an indicator of the increasing inappropriateness of the sportsperson article in current DTAs in force. While the initial justification for the article's inclusion may have been valid, in a global economy with business and individuals more mobile than national tax systems, an article focussed on only one class of mobile worker is inappropriate and lacks relevance.

Abstract

As national governments react to global tax issues, development in exchange of information is bound to occur. However, to supplant withholding taxes in source States and to fully support the residence basis of taxation, regular (and reciprocal) exchange of information is required between States. Currently, differences in domestic tax systems and inefficiencies in exchanges render withholding taxes a necessary (albeit a crude) substitute to ensure that the income is taxed at least once between the source State and resident State. Advances in exchange of information are progressing rapidly and it is hoped that automatic relevant exchange of information in the future will remove the need for unnecessary withholding taxes and ensure that the right tax is levied on the right person in the appropriate State (Pocock, 2001).

The South African withholding tax on sportspersons should be aligned with the sportsperson article in the interim (or a replacement article in the future). South Africa should also continue to actively pursue exchanges of information with other States and encourage other States to do so in global forums.

It is recommended that the DTA sportsperson article be deleted and replaced with a more appropriate and relevant DTA article concerning all mobile individuals.

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ABBREVIATIONS AND GLOSSARY

Act 31 of 2005	Revenue Laws Amendment Act, 31 of 2005
ATO	Australian Tax Office
CSARS	Commissioner for the South African Revenue Service
DTA / treaty	Double Tax Agreement / Double Tax Convention
ECJ	European Court of Justice
EU / EC	European Union / European Community
FIFA	Fédération Internationale de Football Association
ITA	Income Tax Act 58 of 1962 (as amended)
OECD	Organisation for Economic Co-operation and Development
OECD Model	OECD Model Tax Convention on Income and on Capital
OECD Commentary	Commentary on the OECD Model Tax Convention on Income and on Capital
SARS	South African Revenue Service
State	Country or Contracting State in a bilateral DTA
State T	The Third State (i.e. neither the country of residence nor source in the relevant scenario)
The source State	The State (country) of Source
The residence State	The State (country) of Residence
UN Model	United Nations Model Double Taxation Convention between Developed and Developing Countries
USA Model	USA Model Income Tax Convention
VCLT	Vienna Convention on the Law of Treaties

CHAPTER 1

INTRODUCTION

1.1. SPORTS

Increasing professional sporting activities in South Africa and the inflow and outflow of sporting personalities has drawn the attention of National Treasury with specific tax legislation being the result. Increasing competitions cross-border has lead to greater movement of sportspersons. Countries vie for the honour of hosting major sporting events. The FIFA World Cup is a prime example, with South Africa announced to host this event in 2010.

The "life" of a sportsperson is generally short-lived, particularly in contact sports. Top professional sportspersons are often considered "old" by the age of 35. This is not true of all sports. For example, golfers have a longer sporting lifespan. The sporting "lifespan" may also be extended by streaming sportspersons into categories (such as juniors, open and masters). In most sports the reward that sportspersons receive takes cognisance of the "risk" of the limited lifespan; degree of difficulty of achieving the highest ranking and the popularity of the sport. Earnings from sporting performance can therefore be significantly higher than other "every-day" work.

This shortened working life of the sportsperson provides such persons only limited time to make a significant impact. A single competition could provide the catalyst to a career (or end it). Established sportspersons also face the constant challenge of younger players pushing for recognition and to establish themselves as regular features in the sport.

There has been a great influx of sportspersons to South Africa in recent years as South Africa has become more involved in international sports. The South African cricket team, at time of writing, are ranked number 1 in the World; the Bulls rugby team have won the 2009 Super XIV tournament (against teams from New Zealand and Australia) and the 2009 FIFA Confederations Cup (soccer) has started and is soon to be followed by the 2010 FIFA World Cup (soccer).

With South Africa hosting international sporting events and international sportspersons of all types of sport performing in South Africa, the income tax consequences for such performances must be addressed. Apart from papers discussing the South African withholding tax requirements, no comprehensive study has been done on the interaction of this withholding tax with the South African Double Tax Agreement ("DTA") network.

1.2. PURPOSE AND VALUE OF THE RESEARCH

This thesis analyses the income tax impact for international (non-resident) sportspersons performing in South Africa. Not only must the domestic withholding tax on sportspersons be considered, but also the interaction that such tax has with the DTA between South Africa and the sportsperson's State (country) of tax residence. A South African perspective on this topic has not been examined and this work aims to add this perspective to international knowledge.

The clarification of the interpretational issues surrounding the taxation of sportspersons from a South African legislation and DTA viewpoint will be invaluable for both the South African Revenue Services and potential non-resident taxpayers (sportspersons) and international tax advisors.

The research has many practical applications, namely:

1. Identifying potential difficulties that will be faced in applying the new withholding tax.
2. Conflicts between domestic interpretations and international interpretations will be identified (as well as possible solutions).
3. Highlighting the need for potential renegotiation of older tax treaties.
4. Providing a source for the interpretation of the clause relating to sportspersons in South African tax treaties.
5. Determining whether the new withholding tax and sportsperson article in South African DTAs should be repealed and deleted respectively.
6. Providing a practical tool for tax planning for tax advisors and tax paying international sportspersons performing in South Africa.
7. Alerting South Africa sporting bodies to the income tax consequences for sportspersons when hosting a sports event in which international sportspersons will perform.

South Africa is increasingly involved in international markets. This active economic participation will result in DTAs playing a much larger role. A common DTA interpretation

between States, National Revenue Services and taxpayers will prevent unnecessary legal actions and promote increased economic activity.

This research will provide a comprehensive resource and reference guide for South African sports bodies and international sportspersons and tax advisors on the income tax implications for international (non-resident) sportspersons performing in South Africa.

South Africa is the economic hub for the Southern African region. Encouraging international sporting events can only serve to improve awareness of South Africa and increase tourism. Central to the encouragement of sporting events must be an environment of fair taxation for performance. Excessive taxation or inefficiencies caused by inappropriate interpretations and applications of the law when examined with DTAs can only serve to discourage sporting events to the detriment of the economy.

While South Africa, like many countries in the world, has a residence basis of taxation coupled with a source basis for the taxation of non-residents, the taxation of non-resident sportspersons is unique when the DTAs are considered. DTA articles concerning sportspersons provide the source State with the right to tax the income of the sportsperson irrespective of the length of stay. This is completely at odds with the treatment of other mobile workers which are considered in other DTA articles.

1.3. STRUCTURE AND RESEARCH QUESTIONS

Each chapter in this thesis answers questions relevant to the central theme of the taxation of international (non-resident) sportspersons in South Africa.

Chapter 2 serves a dual purpose. Firstly the chapter provides background to the South African tax system and interpretational rules applicable to domestic fiscal legislation. Secondly, the chapter discusses the interpretation of DTA provisions from a South African perspective and answers the question whether the OECD Commentary can be used as an interpretational tool for South African DTAs. The answer to this question is important, not only to establish a mechanism to interpret the DTA articles in later chapters, but also the relevance of the OECD to South Africa (as South African is not a member of the OECD). In addition, the critical issue of the application of changes to the OECD Commentary in interpreting a DTA concluded earlier is also addressed from a South African perspective.

The methodological approach to the interpretation and analysis of the withholding tax on sportspersons and the DTA articles analysed is provided in chapter 2. This approach provides a relevant result as it would be such an approach followed by the courts in interpreting these interrelated aspects of income tax in South Africa.

The South African income tax law relating to international sportspersons is examined in Chapter 3. Before any analysis can be performed on DTA articles pertaining to sportspersons, there must first be a domestic tax implication. South Africa recently introduced a new withholding tax on sportspersons performances in South Africa (with effect from 1 August 2006). This is a significant change from the previous methods of taxation applied to sportspersons in South Africa. The chapter answers a number of questions, namely:

1. Who is a sportsperson for the purposes of the new withholding tax?
2. What earnings are contemplated or fall within the scope of the legislation?
3. Is apportionment necessary for certain income streams and is there an appropriate (objective) method of determining the relevant portion of the income stream.
4. What is the effect on non-resident sportspersons excluded from the withholding tax?
5. Does the new withholding tax have a "look-through" approach for "rent-a-star" companies i.e. sportspersons using legal entities to avoid certain tax effects?
6. Is the new withholding tax (levied on the gross receipts of the sportsperson) beneficial to the non-resident sportsperson?
7. Is the new withholding tax a more effective system and have the potential to be more effective in collections (as intimated by government when the legislation was proposed)?

Most South African DTAs consider "normal tax", "withholding tax on royalties" and "secondary tax on companies". As the new withholding tax on sportspersons does not fall within the scope of any of those taxes, chapter 4 considers whether the DTAs South Africa has entered into (and that are in force as at 1 June 2008) apply to this domestic tax. As the South African Income Tax Act ("ITA") houses a number of taxes on income and wealth,[1] the arrangement of the provisions of the ITA play a significant role in determining the tax effects.

[1] Taxes on income include: normal tax; withholding tax on royalties paid to non-residents; withholding tax on the sale of immovable property by a non-resident; capital gains tax; employees tax. Taxes on wealth include donations tax. Secondary Tax on Companies ("STC") is also housed in the ITA but concerns the taxation of dividends and not income.

Chapter 5 provides the analysis of the sportsperson article in the South African DTA network. The chapter firstly discusses the meaning of "sportsperson" and whether the meaning is to be derived from the context of the DTA or the South African domestic meaning. As the contextual meaning may differ from the domestic meaning (resulting in a misalignment between the South African domestic legislation and the DTA application), these differences are considered. In addition, many of the DTAs do not use the term "sportsperson" but rather use "sportsmen" or even "athlete". Consideration is given whether these different terms result in a different interpretation between DTAs. This part of chapter 5 is supported (in Appendix E) by a comparison of all South African DTAs in force at 1 June 2008 with the OECD Model, UN Model and USA Model DTAs.

The income contemplated within the scope of the DTA article is also considered. The purpose of this analysis is again to identify any differences in scope between the domestic legislation and the DTA article. As the DTA article takes precedence, to some extent (refer chapter 2) over the domestic law, such misalignment can have significant consequences.

South Africa does not generally apply "look-through" provisions. This is also true of the withholding tax on sportspersons. However, an anti-avoidance provision was inserted in the South African withholding tax provisions to prevent avoidance of the withholding tax where payment is made to a person other than the sportsperson and the payment relates to the sportspersons performance. The "entity paragraph" in the OECD Model DTA article was introduced for that purpose. Chapter 5 discusses the use of the entity paragraph in South African DTAs and its alignment (or lack thereof) with the South African withholding tax. Appendix F contains the comparative information for the entity paragraph for all the South African DTAs in force at 1 June 2008 with the OECD, UN and USA Model DTAs.

Certain performances by sportspersons are excluded by explicit reference in the DTA article, such as cultural exchanges funded by one or the other contracting State. These types of exclusions are examined as well as the prevalence of the use of such exclusions in South African DTAs. As the DTA provision overrides that of the withholding tax, these exclusions can play a significant role on the South African income tax effect for the sportsperson. Appendix F contains the analysis of the use of a "public funds" or a "cultural exchange" deviation paragraph in the sportsperson article for South African DTAs in force at 1 June 2008.

Chapter 5 also examines some recent international developments and assesses the impact that these developments may have on the South African withholding tax and South African DTA network.

This chapter ultimately concludes whether the sportsperson article is appropriate in South African DTAs i.e. whether it should be deleted or replaced with an article addressing all mobile workers.

The 1987 OECD Report indicated that one of the improvements required for appropriate taxation of sportspersons was improved exchange of information between States. Chapter 6 postulates whether improved exchange of information could remove the need for the sportsperson article i.e. if the purpose for introducing the sportsperson article has been superseded by the scope of the exchange of information article, is the sportsperson article still necessary or should it be deleted. To support the analysis in Chapter 6, appendices I to L provide the detailed review of the exchange of information article in all the South African DTAs (in force at 1 June 2008) against the OECD Model on which they have been based and the UN and USA Models where the South African DTA has made use of part of these model articles.

Chapter 7 provides the analysis of the legislation promulgated concerning the 2009 FIFA Confederations Cup and the 2010 FIFA World Cup in South Africa. Various concessions have been granted to FIFA and its Affiliates. The chapter analyses those provisions that will impact the international (non-resident) sportspersons performing in those events. The analysis tests whether the "FIFA legislation" will be beneficial or detrimental to the taxation of non-resident sportspersons. In addition it is assessed whether the FIFA legislation will cause increased difficulty in the application of the South African withholding tax on sportspersons and the DTA articles. To assist international tax advisors and international sportspersons, the countries that may potentially qualify for the FIFA 2010 World Cup in South Africa are compared against the list of South African DTAs in force at 1 June 2008. The detail of this analysis is contained in Appendix G.

Chapter 8 provides the conclusions and recommendations derived from the study.

1.4. LIMITATIONS TO THE STUDY

This study will examine the South African income tax and DTA effects on sportspersons and does not examine the domestic tax law of other countries nor any other taxes (e.g. Value Added Taxation; Customs and Excise; etc). Domestic law of other countries may be mentioned for illustrative purposes.

In addition, this study is not concerned with the taxation of sporting bodies, associations and organisations responsible for organising and running sporting events. The focus of this thesis is on the taxation of sportspersons performing in sport in South Africa. The position of South African resident sportspersons performing outside of South Africa is likewise not considered in detail (except to the extent of providing a comparison against the non-resident position).

While the DTA article on sportspersons also considers artistes and entertainers, this thesis has as its focus sportspersons. Artistes and entertainers are excluded for the reason that other studies have considered this group of taxpayers (albeit not from a South African perspective) and the nature of the expenses incurred as well as some of the income earned by such persons is different.

The thesis also does not test the application of the credit or exemption methods for the relief from double taxation as permitted by the South African DTAs or the model DTAs. The thesis did not include in its scope, analysis of the domestic taxation in the partner DTA states. As a result, the thesis cannot conclude on whether any specific partner state would apply an exemption or a credit method domestically. All that can be examined in this regard is the equivalent to Article 23 of the specific DTAs to establish whether the DTA favours a credit or an exemption approach to provide relief from double taxation.

Of the DTAs in force at 1 June 2008, only 8 apply the exemption method for the relief from double taxation in the DTA. These countries include: Austria (1996), Belgium (1995), Bulgaria (2004), Germany (1973), Hungary (1994), Luxembourgh (1998), Poland (1993) and Switerland (1967). Of these, a new DTA has been ratified with Switzerland (2009) and a new DTA with Germany has been negotiated. The new DTA with Switzerland retains the exemption method for elimination of double taxation.

There is also no relevance to this thesis for such analysis as this thesis is not concerned with the taxation in the residence State.

CHAPTER 2

THE SOUTH AFRICAN TAX SYSTEM AND INTERPRETATIONAL RULES

2.1. INTRODUCTION

Before an analysis of domestic legislation and the South African Double Taxation Agreement ("DTA") network can be undertaken, it is first necessary to review the income tax system with which South Africa operates, the tools of interpretation adopted by the South African courts and the methods of interpretation of DTAs. These tools and methods of interpretation represent the methodology applied to the interpretation of the withholding tax on sportspersons and the South African DTAs.

The South African tax system has developed over the years strongly influenced by the country's history. Our common law, is based largely on Roman-Dutch law. Our commercial law has been strongly influenced by English law, with English decisions carrying strong persuasive weight in our courts.

In more recent years and with South Africa's reintroduction into the international community, fiscal legislation has had to develop quickly to align with international norms. Much of the existing fiscal legislation has been drawn from a variety of sources in an attempt to arrive at a best international practice tempered by the needs of a developing nation.

After the broad outline of the current income tax system, this chapter reviews the interpretational rules developed by our courts and applicable to domestic legislation. With the introduction of the new withholding tax on sportspersons and the rapidly evolving ITA, terms used elsewhere in the fiscal legislation and adopted for the withholding tax or newly inserted terms must be interpreted using the domestic interpretational rules.

In an international context, the DTAs entered into by the National Executive and ratified by Parliament are incorporated into domestic law. This places DTAs firmly within the jurisdiction of the South African courts. To what extent the domestic interpretational rules are

applied to international agreements and whether the South African courts should review any external sources must be assessed and answered.

As South Africa is also fairly new to the international scene with the bulk of our treaties entered into after 1994, the starting point for the South African DTA negotiations has largely been the OECD Model. To what extent the OECD Commentaries can then be used by the South African courts is critical to the interpretation of the South African DTAs. In particular, as customary international law is recognised as law in South Africa in terms of the Constitution of the Republic of South Africa, 1996, would the OECD Commentaries constitute customary international law in South Africa, taking note that South African is not a member of the OECD? Similarly, should the South African courts consider the commentaries from other model treaties?

The objective of this chapter is to address the above issues, critical to contextualise the analyses in the later chapters.

2.2. INTRODUCTION TO THE INCOME TAX SYSTEM

2.2.1. Income tax basis and taxes levied in terms of the ITA

Since 2000, South Africa has a residence-based system of income taxation. This implies that South African residents are subject to South African tax on their worldwide earnings whereas non-residents are only subject to South African tax on earnings from a South African source. To impose South African income tax it is necessary to determine first whether the person is a resident and then the source of the income. Despite residents being taxed on worldwide earnings, source principles remain relevant. Unilateral tax relief (in the form of a credit against South African income tax) only applies to foreign taxes on amounts that do not qualify as either true or deemed South African source.[2] The concepts of residence and source are discussed later in this chapter.

Income tax is imposed in terms of the Income Tax Act 58 of 1962. The ITA is, generally, amended twice per year. The first amendments follow the Minister of Finance's budget presentation to Parliament. These amendments are aimed at monetary changes within

[2] A deduction against South African taxable income is permitted for foreign tax incurred on amounts from a true or deemed South African source where such amount is included in taxable income.

provisions of the Act as well as simple technical amendments. The second amendments consist of lengthy technical amendments, corrections and clarification of legislation.

The ITA contains a variety of taxes on income. Normal tax is the first of these taxes. It is imposed on an annual basis and is based on the determination of the taxpayer's taxable income. Supporting normal taxation is a variety of specialist rules. The first of these are known as the corporate rules.[3] These provisions are aimed at deferring taxation consequences for certain corporate restructurings and intra-group transactions. As South Africa does not have a group taxation system, these rules are necessary to permit free movement of assets and shares within a group without burdensome taxation consequences. Schedules to the Income Tax Act are often used to provide the detail for the enacting provisions of the Income Tax Act.[4]

As a result of normal tax only being determined on an annual basis, for the purposes of collection, the Income Tax Act also administers the systems of employees tax and provisional tax. Employees tax is levied on remuneration earned by employees and is withheld and paid over on a regulated basis to the South African Revenue Services by the employer.[5] In addition, remuneration will also include so-called fringe benefits.[6] These are non-cash advantages awarded to taxpayers by virtue of their employment. Employees tax and provisional tax are tax credits against normal tax.

Donations tax, a wealth tax, is also imposed in terms of the Income Tax Act. This tax is imposed at a flat rate of 20% of the market value of the donation, subject to certain exemptions. Secondary tax on Companies (STC) is a tax on dividends declared by South African companies. STC is soon to be repealed and replaced with a withholding tax on dividends.

[3] Part III of Chapter II of the Income Tax Act – Special rules relating to asset-for-share transactions, amalgamation transactions, intra-group transactions, unbundling transactions and liquidation distributions

[4] Examples include Schedule 1 – Computation of taxable income derived from pastoral, agricultural or other farming operations; Schedule 2 – Computation of gross income derived by way of lump sum benefits from pension, provident and retirement annuity funds; Schedule 8 – Determination of taxable capital gains and assessed capital losses; Schedule 9 – Public benefit activities; Schedule 10 – Oil and gas activities

[5] Schedule 4 to the Income Tax Act – Amounts to be deducted or withheld by employers and provisional payments in respect of normal tax

[6] Schedule 7 to the Income Tax Act – Benefits or advantages derived by reason of employment or the holding of any office

Non-resident sellers of South African immovable property are subject to a withholding on gross amounts paid to them. The amounts withheld act as a credit against the final normal tax liability i.e. this is not a final withholding tax.

There are two final withholding taxes in the Income Tax Act. The first is a withholding tax on royalty or similar payments to non-residents.[7] The second is discussed at length in Chapter 3 and is the withholding tax imposed on non-resident entertainers and sportspersons.[8]

2.2.2. Concept of residence

The term "resident" is defined in the Income Tax Act and governs both individuals (natural persons) and companies (non-natural persons).

2.2.2.1. Individuals

There are two tests to determine whether a natural person is a resident as defined. The first test is the "legal subjective" test and the second is the physical presence test. If a natural person is found to pass either of these tests, that person will be a resident for the purposes of South African income tax.

The legal subjective test considers a person to be a resident if such person is "ordinarily resident" in the Republic. The term "ordinarily resident" is not defined in the Income Tax Act and its meaning has been established in the courts as "the country to which he would naturally and as a matter of course return from his wanderings, as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home".[9] This would be "despite absences of long or short duration".[10] The SARS has issued an Interpretation Note[11] addressing this test. While not law, the interpretation notes reflect the SARS practice and application of the test.

[7] Imposed at a flat rate of 12% on the gross amount received by or accrued to the non-resident.

[8] Imposed at a flat rate of 15% on the gross amount received by or accrued to the non-resident.

[9] Cohen v Commissioner for Inland Revenue 13 SATC 362 at 371

[10] Commissioner for Inland Revenue v Kuttel 54 SATC 298 at 305

[11] Interpretation Note 3 (4 February 2002) is available at http://www.sars.gov.za

As in other countries, determining whether a person is ordinarily resident is a question of degree.[12] While a variety of factors will be used to apply the above tests, it should be noted that the concept of ordinarily resident differs from domicile and nationality.

Should the legal subjective test fail then the objective physical presence test[13] is applied. In line with international norms, this test requires the natural person to have been physically present in the Republic for more than 91 days in the current year of assessment;[14] more than 91 days in each of the five preceding years of assessment; and more than 915 days in aggregate over the five preceding years of assessment. If all three criteria are met, the person is deemed to be a resident of the Republic. The natural person shall remain resident until absent from the Republic for a continuous period of more than 330 days, in which case the person shall be deemed to be non resident from the start of that continuous absence.

Whether the person is ordinarily resident or deemed to be resident in terms of the physically presence test, such person is excluded from the definition where "deemed to be exclusively a resident of another country for the purposes of the application of any agreement entered into between governments of the Republic and that other country for the avoidance of double taxation".[15]

2.2.2.2. Companies

Persons other than natural persons are considered to be resident in South Africa if such person is incorporated, established or formed in the Republic, or if South Africa is the place of effective management. If any one of these criteria is satisfied, the non-natural person is a resident as defined.

Similarly to the treatment of natural persons, the non-natural person is excluded from the resident definition where "deemed to be exclusively a resident of another country for the

[12] Cohen v Commissioner for Inland Revenue supra at 366

[13] A discussion of the physical presence test and examples are contained in the SARS Interpretation Note 4 – Issue 3 (8 February 2006) available at http://www.sars.gov.za

[14] A year of assessment runs from March to February (both months inclusive) for natural persons and certain non-natural persons. Company years of assessment match the financial year of the company.

[15] Section 1 Income Tax Act 58 of 1962

purposes of the application of any agreement entered into between governments of the Republic and that other country for the avoidance of double taxation".[16]

2.2.3. Concept of source

The theory to applying source to non-residents was described in the South African Appellate Division case of *Kerguelen Sealing & Whaling Co. Ltd v CIR*[17] in which it was stated:

> "In some countries residence (or domicile) made the test of liability for the reason, presumably, that a resident, for the privilege and protection of residence, can justly be called upon to contribute towards the cost of good order and government of the country that shelters him. In others (as in ours) the principle of liability adopted is 'source of income'; again, presumably, the equity of the levy rests on the assumption that a country that produces wealth by reason of its natural resources or the activities of its inhabitants is entitled to a share of that wealth, wherever the recipient of it may live. In both systems there is, of course, the assumption that the country adopting the one or the other has effective means to enforce the levy."

This carries the implication that the non-resident has benefitted from use of South Africa's resources and must therefore contribute to the costs of government. Holmes (2007) provides that: "[t]he benefit theory rationale behind the source basis of taxation therefore implies that the non-resident taxpayer needs to have some sort of presence in [South Africa] in order to be able to take advantage of the public goods and services offered by the government".[18]

The term "source" is not defined in the Income Tax Act. However, South Africa's history of taxing residents and non-residents on a source basis has led to the courts outlining the principles of source. These principles are loosely referred to as the "true source" principles. South Africa has also legislated source provisions, which usually govern sources of income that would otherwise have failed the true source tests. Both types of South African source can lead to a tax liability for a non-resident. The concept of source as pertains to sportspersons is discussed further in Chapter 3.

[16] Section 1 Income Tax Act 58 of 1962

[17] (1939) 10 SATC 363

[18] Holmes (2007) at 20

2.2.4. Concept of capital and revenue

Whether a transaction is one of a capital or a revenue nature is a question that has over the years generated a plethora of case law. The income taxation consequences of the transaction being of a capital nature are significantly different to those for revenue. Most notably before the introduction of capital gains tax, transactions of a capital nature were excluded from gross income. While capital gains now form part of taxable income, the determination of a taxable capital gain remains advantageous to the taxation of the transaction as revenue.

2.2.5. Tax rates

Individuals are taxed on a progressive rate structure starting at the lowest marginal rate of 18% to the highest marginal rate of 40% on amounts in excess of R525 000.[19] Such persons, irrespective of residence, also qualify for rebates against the tax determined in accordance with this table. These rebates are not cumulative, nor do they create losses.

Companies are taxed on a flat rate of 28%, unless the company is a foreign branch, personal service company or personal service trust in which case the rate is increased to 33%. Trusts are taxed at a flat rate of 40%. Small business corporations are taxed on a progressive rate structure. Companies (other than foreign branches) are also subject to STC of 10% on net dividends declared. Insurance companies and mines, not relevant for the purpose of this thesis, have special tax rates.

A wealth tax on donations is levied at a flat rate of 20% on the market value of the donation. This is only applicable to residents.

2.2.6. Other taxes on income

Non-residents are potentially subject to a variety of withholding taxes. The final withholding tax on royalties is levied at a flat 12% on the gross amount. No deductions are permitted.

The sale of immovable property in South Africa by a non-resident also generates a withholding tax on the gross payments made to the non-resident. However, this is not a final withholding and is used as a tax credit against the normal tax liability when finally determined.

[19] The amount of R525 000 is relevant for the year of assessment ending 28 February 2010 (2009: R490 000) and is subject to amendment by the Minister of Finance each year.

Lastly, for non-resident sportspersons and entertainers, there is a final withholding tax of 15% on the gross amounts payable in respect of the "specified activity" performed by that person. Further discussion and analysis of this withholding is made in Chapter 3.

2.3. INTERPRETATION OF SOUTH AFRICAN INCOME TAX LEGISLATION

2.3.1. Common law rules of interpretation

The main principle of interpretation of fiscal legislation in South African common law was drawn from the English decision of *Partington v The Attorney-General*[20] and quoted with approval in the 1924 income tax case of *George Forest Timber*.[21] It provides that the legislative intention is found in the exact wording of the legislation, the so-called "literal interpretation" principle. However, such literal interpretation is tempered by the context in which the words appear (see 2.3.5. below).

Meyerowitz (2008),[22] summarising the courts' various rulings on matters of interpretations, states: "It is often said that a grammatical and logical construction must be placed on the words in a statute. The words must be read in the light of their popular or ordinary and natural sense, carelessness in drafting notwithstanding, and the context must not be ignored. But considerations which may serve to interpret expressions which are obscure or ambiguous cannot be invoked so as to stigmatise words which are plain".

The courts do attempt to limit deviations from the exact wording of the legislation. Clegg *et al* (2007) state the following:

> "A study of tax cases shows that in the interpretation of tax acts, just as with other enactments, the intention of the legislature is sought. The courts are not prepared to depart from a literal interpretation where there is doubt as to the legislature's intention, but where the intention is manifest the courts will give effect to that intention.
>
> It is significant that it is in fact a tax case, namely *Farrar's Estate v CIR*, in which confirmation of the view that the intention of the legislator should always be the decisive factor, is found. In this case the words of the Act were modified to give effect to the intention of the legislature and it was stated that '[t]he governing rule

[20] *Partington v The Attorney-General* 21 LT 370

[21] *CIR v George Forest Timber* (1924) 1 SATC 20

[22] At 3-5.

> of interpretation – overriding the so-called 'golden rule' – is to endeavour to ascertain the intention of the law-maker from a study of the provisions of the enactment in question, and there is no doubt that the literal, grammatical meaning of the words must give way to that rule.'
>
> Confirmation of the view that the courts are prepared to depart from literal interpretation if the intention is manifest is also to be found in *Glen Anil Development Corporation Ltd v CIR,* and there are numerous examples of tax cases where the courts applied a restrictive interpretation or modified the words of an Act in order to give effect to the clear intention of the legislature".[23]

That the South African courts are not prepared to deviate from the words of the legislation where intention is unclear was clearly demonstrated in *Loewenstein.*[24] The principle here being that where intention is unclear, the meaning must be derived from the words used by the Legislature to indicate their intention. Where intention is clear, but the wording does not reflect such intention, the courts will deviate from the wording used. However, the intention must be clear and not merely probable for the courts to deviate from the wording of the statute.[25]

It has also been noted by the courts that care must be taken when interpreting words in legislation that have been amended by different draftsmen over a number of years. Clegg *et al* (2007) state the following:

> "the Court observed that 'some caution is required before attributing an intention to the drafter of legislation by inference. Giving meaning to particular words by drawing upon language that is used elsewhere in a statute is no more than the application of a process of logical reasoning – it is usually reasonable to infer that the compiler of a single document has used language consistently throughout. But where a voluminous and complex statute has been repeatedly amended, probably by various drafters, over a long period of time . . . that inference will not necessarily be sound'.
>
> After further discussion the Court concluded that
> 'rather than attempting to draw inferences as to the drafter's intention from an uncertain premise, we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation'".[26]

Refer also to the discussion on the "use of terms in context" in 2.3.5 below.

[23] At 2.1 and supported in De Koker (ed) (2007) at 25-3; Meyerowitz (2008) at 3-7 and Williams (2006) at 8.

[24] *CIR v Loewenstein NO* (1958) 22 SATC 249

[25] See *SCB Investments (Pty) Ltd v COT* 23 SATC 416 at 424.

[26] At 2.1

The common law principles used by the courts to interpret fiscal statutes was summarised by Steyn (2008), drawing from ITC 1384, into the following two key principles, namely:

(a) "the main task is to ascertain the intention of the legislature, which is primarily to be sought in the language it chose to use; and

(b) unless the contrary be clearly evident from the terms of the measure itself, the legislature is presumed not to have intended an unfair, unjust or unreasonable result, and the concomitant of this latter principle is that a statute must be so interpreted as to be as unoppressive as possible".

These two principles crystallise the decisions of higher courts on the interpretation of fiscal legislation and has been dubbed the "new approach". [27]

2.3.2. The *contra fiscum* rule

This difficult rule of interpretation is summarised by Meyerowitz (2008)[28] as follows:

> "a doubtful (i.e. ambiguous) provision in a taxation statute must be construed against the larger imposition, or the benefit of the doubt must be given to the person sought to be charged. If the provision in question does not permit any doubt, the rule cannot be applied. The courts will not construe a taxing statute so as not to impose a burden by a process of allowing considerations of equity to create a supposed ambiguity which in fact does not exist, and it does not matter whether the provision in question is one charging tax or allowing for a deduction. The rule does not apply to every provision of a fiscal statute. A provision designed to prevent tax avoidance should not be construed as a taxing measure but rather in such a way that it will advance the remedy provided by the section and suppress the mischief against which the section is directed".

2.3.3. Judicial decisions as a source of income tax law

The Constitutional Court in South Africa is the highest court and decides on constitutional matters.

> "That Court could in theory become involved in fiscal matters, where any such legislation or the application thereof could be said to impact on constitutional rights. It is, however, wary to do so, and with good right. For the Constitutional Court to pronounce on a dispute between a taxpayer and SARS could create a precedent which could have significant implications for the State and its intricate web of tax laws. The Constitutional Court accordingly appears to prefer to leave it to the Supreme Court of Appeal to deal with all matters relating to fiscal legislation. It does, however, not mean that the Constitutional Court will not hear a matter where there is truly a constitutional issue at stake. It will,

[27] The "new approach" is also referred to in De Koker (ed) (2007) at 25-8.

[28] At 3-10. Further information can be found in the article by Lewis Dison, 93 SALJ 159 (1976)

> however, have to be beyond doubt that what a party seeks to place before it is a constitutional matter and not simply a common law issue dressed up as constitutional fare" (Steyn, M. 2008).

The Supreme Court of Appeal (SCA), previously known as the Appellate Division (AD), is the highest court for non-constitutional matters. Judgments from this court create legal precedent (as regards to the *ratio decidendi* but not the *obiter dicta*) for all courts beneath it. It is extremely rare for judgments of this court to deviate from its previous judgments (where the underlying legislation has not been amended).[29] This court effectively acts as the final court of appeal for taxation cases.

The provisional divisions of the High Court sit below the Supreme Court of Appeal. Judgments from these courts bind other High Courts but not the Supreme Court of Appeal. These judgments (in the absence of a Supreme Court of Appeal judgment) act as legal precedent.

The Tax Courts and Tax Boards are bodies created by the Income Tax Act and are not courts of law. While these courts and boards hear tax matters, the decisions made do not create legal precedent. The decisions do however have persuasive value in the higher courts.

2.3.4. Foreign court decisions as a source of South African income tax law

Foreign judgments do not bind South African courts, but have persuasive value. This is particularly true of decisions in countries from which our common law is derived. Foreign judgments are often referred to by our courts where experience is perhaps lacking and where the decision follows a basis that would be reasonable in the context of our common law.

> "The decisions of the courts of the United Kingdom are, generally, of persuasive value in South Africa, and decisions of the House of Lords and the Privy Council carry particular weight. Such persuasive value attaches not only to the order of the court in questions, but to the force and validity of the reasoning on which the order is based.
>
> Decisions of the Australian courts are frequently cited by our courts in matters of income tax because similarities between the two tax systems (South Africa's first income tax legislation was modelled on that of New South Wales), and decisions of the courts in the United States of America are occasionally cited" (Williams, 2006:16).[30]

[29] See De Koker (ed) (2007) at 25-12.

[30] See also De Koker (ed) (2007) at 25-12 and Meyerowitz (2008) at 3-11.

It is submitted that as our South African case law in relation to treaties is very limited, the South African courts are likely to look to foreign judgments and other relevant sources (refer to Part 4 for further detail on the interpretation of South African DTAs).

2.3.5. Interpretation Act 33 of 1957 and undefined terms

The Interpretation Act 33 of 1957 provides the meaning of commonly used terms in South African legislation. Where the ITA contains a definition in conflict with or in addition to the definitions in the Interpretation Act, the definitions as contained in the ITA would apply.

Where a term is not defined in either the Interpretation Act or the Income Tax Act, the ordinary dictionary definition will apply (i.e. the ordinary meaning of the word) in terms of the context in which it appears.

The meaning of a word in the context is critical to its interpretation. Such context may override the definition contained in the relevant Act. In *CIR v Simpson*[31] the court found that the term "income" in the context should be interpreted as "profit" or "gain" rather than the strict definition supplied in the Income Tax Act.[32] Chief Justice Watermeyer then added: "it seems to me that effect should be given to the rule laid down by Halsbury, *Laws of England*, in para. 591 of Vol. 31 (Hailsham ed.), viz.: 'A definition section does not necessarily apply in all the possible contexts in which a word may be found in the statute. If a defined expression is used in a context which the definition will not fit, it may be interpreted according to its ordinary meaning'".

Clegg *et al* (2007) also note the following from this judgment: "Section 7 of Act 31 of 1941, which defines 'income' and which was under consideration in the *Simpson* case, did not contain the words 'unless the context otherwise indicates'.[33] This means that where the context demands that a meaning different to that of the definition section should be given to a word, this will be done even though the definition section does not contain the words 'unless the context otherwise indicates'".

[31] 16 SATC 268 at 282

[32] Income is defined in the ITA as meaning "the amount remaining of gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under Part I of Chapter II"

[33] Section 1 of the ITA (containing the general Act definitions) now opens with the words "In this Act, unless the context otherwise indicates".

It is clear that judges will not easily depart from the defined terms. It must be clear that use of the defined term would yield a result not intended by the Legislature for the courts to deviate. Clegg *et al* (2007) state further:

> "In determining whether or not the context otherwise indicates, the whole of the Act must be considered, since other parts thereof may shed light upon the intention of the legislature and may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act. This rule is sometimes expressed in the following maxim: *Ex antecedentibus et consequentibus fit optima interpretatio* – a passage is best interpreted by what goes before it and what follows it.
>
> Before it can be held that 'the context otherwise indicates', it will have to be shown that the application of the definition would lead to a result which the legislature could not be supposed to have intended, and that by excluding the definition the result will be a more reasonable result which the legislature could be supposed to have intended. Furthermore, even where the context requires that part of a definition should not apply, this does not necessarily prevent the application of the rest of the definition.
>
> Nevertheless, where the court is satisfied that a meaning other than the meaning in the definition ought to be given to a particular word in the section that is being interpreted, having regard to the context, it will give such different meaning to the word."

2.3.6. Summary of South African interpretational rules

The courts will generally interpret the legislation by examining the words used in their context within the provision and the Act. Where the meaning is clear, it will be adopted. Where the intention of Parliament is clear, but the words do not result in such intention, the courts will interpret the words used according to the intention. However, if the intention is unclear, the ordinary meaning of the words and the context in which they are used will be decisive in determining the intention of Parliament. In cases where the words used provide two equivalent meanings, the words will be interpreted *contra fiscum*.

2.4. INTERPRETATION OF SOUTH AFRICAN DOUBLE TAXATION AGREEMENTS

2.4.1. Introduction

This section addresses the interpretation of double taxation agreements (DTAs) from a South African perspective. The specific issues arising from DTAs in relation to sportspersons are addressed in Chapter 5.

Many of the interpretational rules applicable to South African domestic (or municipal[34]) tax laws are equally applicable to the South African interpretation of DTAs. However, there are a few additions to those interpretational rules as the DTAs are international agreements. This is unsurprising. Vogel (1997) states: "[f]or the effective interpretation of international treaties […] it is necessary to reconcile the various national methods of interpretation".[35] This is clearly necessary as DTAs are bilateral treaties dividing commonly understood taxing rights between states with potentially different systems of taxation. The common meaning is crucial in identifying the meaning of the articles of a DTA.

2.4.2. General interpretational principals applicable to South African DTAs

As detailed in 2.3 above, South African courts focus on the intention of the parties as determined from the language used in the interpretation of domestic fiscal statutes. A similar principle is embodied in the Vienna Convention on the Law of Treaties ("VCLT"). Vogel *et al* in the 1993 General Report for the International Fiscal Association ("IFA") state that the "commentary on the final draft [of the VCLT] by the International Law Commission states that: 'The article[36] […] is based on the view that the text must be presumed to be the authentic expression of the intention of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties'".[37] This reflects the identical position in the common law of South Africa.

This manner of interpretation (as embodied in South African common law and the VCLT) was clearly followed in *SIR v Downing*[38] in which the court assessed the wording of Article 5 (Permanent Establishment) of the relevant treaty and derived the meaning from that text. No further investigation was conducted into the intention of the DTA negotiators.

The South African courts authority to decide matters involving South African DTAs is derived from section 108 of the ITA (see Appendix B for the section wording). The section

[34] The term "municipal" used here to differentiate domestic law from public international law and not in the context of municipalities (local authorities) collecting rates and taxes.

[35] Vogel (1997: 34)

[36] Drafted initially in the VCLT as Article 27 but now is Article 31

[37] Vogel *et al* (1993: 73). Equally supported in Vogel's work *Klaus Vogel on Double Taxation Conventions* (1997: 37).

[38] [1975] 37 SATC 249

provides that the National Executive may enter into agreements between South Africa and other countries "with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collections of the taxes under the said laws of the Republic and of such other country". The DTAs acquire the force of law in the Republic in terms of section 231 of the Constitution[39] after approval by Parliament[40] and publication in the Government Gazette.[41]

Having acquired the force of law, DTAs as international agreements are treated as equal to domestic fiscal legislation. This also means that DTAs do not rank above domestic legislation.[42] This equal ranking can create potential difficulties if domestic legislation is in conflict with or is specifically legislated to override the treaty terms. The protection that Acts of Parliament have stems from the Constitution (see below).

While the potential for treaty override exists, the legislation introduced would, it is submitted, have to stipulate the purpose as being one of override.[43] In the absence of such clearly stated intention, the purpose of the DTAs is to prevent the same income being taxed by both states. Such purpose has a natural override in favour of the DTA in situations where income is taxed both in terms of South African domestic legislation and the legislation of the other Contracting State.[44] General conflicts are therefore likely to be interpreted in favour of the

[39] Constitution of the Republic of South Africa, 1996. Note that in terms of the Citation of Constitutional Laws Act 5 of 2005, no Act number is to be assigned to the Constitution (originally introduced as Act 108 of 1996).

[40] Represented by the two Houses of the National Assembly and the National Council of Provinces

[41] Section 108(2) of the ITA

[42] See Olivier and Honiball at 36 using *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) and *South Atlantic Inlands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) as support.

[43] See *Azapo and others v Truth and Reconciliation Commission and others* [1996] 3 All SA 15 (C) in which it was held (at 26): "The intention to legislate contrary to the *jus cogens* would, however, have to be clearly indicated by Parliament in the legislation in question because of the *prima facie* presumption that Parliament does not intend to act in breach of international law".

[44] See *ITC 1544* in which it was stated: "The terms of a double tax Convention on which statutory status has been conferred are to be considered as any other statutory provisions to determine the extent to which these conflict with the provisions of another statute and whether such provisions have been modified thereby".

DTA treatment.[45] In essence, the conflict must be resolved in terms of an interpretation common to both states. The purpose of the DTA is to divide the taxing rights. As such the division of such rights may result in decisions in favour of the other state.

An international interpretation should be placed on the meaning. DTAs are phrased in a manner not necessarily consistent with (and generally broader than) the domestic legislation. The broad language used in the DTA is necessary to ensure the life of the DTA beyond the date of signature and to incorporate a common understanding of the term.[46] This approach expands the usual domestic application of the literal approach and is consistent with the Constitution, which provides that: "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".[47] The necessity for the court to take a broader meaning into consideration was expressed in *SIR v Downing* where mention was made of an "international fiscal language".[48]

Despite South African not being a signature to the VCLT, it is submitted that the convention applies to South Africa nonetheless, or at the very least Articles 31-33.[49] The International Court of Justice and a number of foreign courts have essentially recognised that the VCLT represents a codification of customary international law.[50] The South African courts, however, have been reluctant to go so far as to say the same. In a Constitutional Court decision,[51] Judge Goldstone stated that "the extent to which the Vienna Convention reflects customary international law is by no means settled".[52] However he went on to assume in

[45] See also Olivier and Honiball at 37-38

[46] In addition to reconciling the two Contracting States domestic laws.

[47] Section 232 of the Constitution of the Republic of South Africa, 1996

[48] Vogel supports this approach (1997: 37) as do Olivier and Honiball (2008: 40) referring to Amatucci's work *International Tax Law* (2006) at 157.

[49] Support for this view can also be found in Holmes (2007:71).

[50] For an extensive analysis see Engelen (who does concede that "a distinction can be made between already existing rules of customary international law, rules of customary international law that became crystallised in the adoption of the Convention [VCLT], and rules set forth in the Convention that eventually may become a rule of customary international law". It is submitted that only the first category is applicable to South Africa. Vogel and Ward *et al* support the general codification view with respect to the VCLT. Olivier and Honiball also concur from a South African perspective.

[51] Harksen v President of the Republic of SA and others [2000] JOL 6307 (CC)

[52] Goldstone provided in footnote 23 to the judgment support for his statement. The footnote provided: "In the 9th edition of Oppenheim's International Law, above fn 19 at 1199, the following observation is made: 'It must be noted that many provisions of the Vienna Convention reflect rules of customary international law which are

favour of the appellant that it did (as such assumption did not assist the appellant or affect the outcome of the judgment). The case considered Article 46(1) of the Vienna Convention and not Articles 31-33 commonly held (as above) to be codification of customary international law.

In the context of Articles 31 to 33 of the VCLT, Engelen quoting Sir Ian Sinclair provides that "there is now strong judicial support for the view that the rules of treaty interpretation incorporated in the Convention are declaratory of customary law" and further that "the Hoge Raad also seemed to have accepted that the rules of treaty interpretation laid down in Articles 31 to 33 [of the] VCLT are a codification of existing customary international law".[53] It is submitted that Articles 31-33 of the VCLT do represent customary international law and as such are binding on the courts to the extent that such customary international law is not in conflict with the Constitution or an Act of Parliament.[54]

Interpretation of South African DTAs must therefore be determined in accordance with the Articles 31-33 of the VCLT representing customary international law.

Adding further support for South African DTAs to be interpreted using international interpretational tools is section 233 of the Constitution that provides: "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is

binding as such quite apart from the Convention; and that other provisions of the Convention may themselves be expected in time to acquire the force of rules of customary law.' (footnotes omitted). And, in Brownlie Principles of Public International Law 5 ed (Clarendon Press, Oxford 1998) at 608, the author states: 'The Convention is not as a whole declaratory of general international law: it does not express itself so to be (see the preamble). Various provisions clearly involve progressive development of the law; and the preamble affirms that questions not regulated by its provisions will continue to be governed by the rules of customary international law. Nonetheless, a good number of articles are essentially declaratory of existing law and certainly those provisions which are not constitute presumptive evidence of emergent rules of general international law. The provisions of the Convention are normally regarded as a primary source: as, for example, in the oral proceedings before the International Court in the Namibia case. In its Advisory Opinion in that case the Court observed: "The rules laid down by the Vienna Convention . . . concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject".' (footnotes omitted)"

[53] Engelen (2004: 54-55)

[54] A German court analysing the effects of the VCLT on a non-signatory party (Turkey) concluded that Article 31 of the VCLT represented customary international law (Germany - Case 3 K 69/05, 26 April 2007 (Summary)).

consistent with international law over any alternative interpretation that is inconsistent with international law".

In addition, further support may be found in a comparison of treaties i.e. treaties with equal statutory status may be examined to assist with the interpretation.[55]

In summary, the principles of interpretation applicable to South African DTAs include the determination of the intention of the states through analysis of the words used in the DTA. In this analysis, the context in which the words appear should not be ignored. Where the words derive meanings different in a domestic versus international context, the international meaning takes preference unless there is a clear indication that Parliament have legislated a DTA override provision.

Context would generally be determined from the sentence, paragraph, Article and DTA as a whole. Where the context fails to reveal the meaning and intention of the states, courts may turn to the so-called Renvoi clause[56] of the treaty and revert to the domestic meaning of the term to be interpreted. This usage is discussed in 2.4.3 below.

2.4.3. Reference to South African legislation for clarity in a South African DTA

DTAs often refer to domestic legislation terms. Article 3(2) is an interpretational clause requiring use of the domestic term when the DTA term is not defined or the context of the term does not provide the necessary definition.

Vogel summaries three problems that may result from changes to domestic legislation referred to by an unchanged DTA as being: (a) the domestic law has been amended; (b) the domestic law carries the same meaning but with a different goal or objective; (c) the new domestic law contradicts the DTA.[57]

[55] In *ITC 1544* (1992: 463) parallel treaties were examined to assist with the interpretation of an Article.

[56] Refers to the equivalent of Article 3(2) of the OECD Model

[57] Vogel (1997: 64)

The first problem must be addressed by determining whether South Africa follows a static approach[58] or ambulatory approach[59] to DTA interpretation. It is submitted that the ambulatory approach must be adopted for the reasons that follow. Practically, a DTA once in force is set to last for many years, whereas changes to the ITA are made twice per year. The purpose of the DTA is to prevent the same amount being taxed in both states for the same taxpayer. As the tax liability is determined in terms of the relevant fiscal year's legislation, the DTA relief would have to take into account changes to the legislation. Furthermore, a number of DTA provisions indicate the use of an ambulatory approach, for example the equivalent to Article 2 (Taxes Covered) contains a number of ambulatory provisions such as the future taxes paragraph and a requirement for states to notify each other of changes to the domestic legislation. Such notification is clearly required to allow the other state to assess whether a renegotiation of the DTA will be required. Finally, the OECD Commentary (having persuasive value – see below) supports an ambulatory approach.[60]

The second problem is solved, it is submitted, in the context of the Constitution's requirement that where domestic and international interpretations exist, the latter is preferred. Furthermore the object and purpose of a DTA is to limit South Africa's right to tax certain incomes of non-residents. In view of this objective,[61] unless the legislation has the express purpose of overriding the DTA (see above), the interpretation should be as unoppressive as possible. This would, it is submitted, also solve the third problem.

In addition, DTA override or legislating against the goal and objective of the DTA would go against the customary international law principle of good faith as embodied in the VCLT. Finally, failure to apply the DTA as commonly understood may result in the other state terminating the DTA or requesting a renegotiation.

A final difficulty in using domestic legislation to interpret DTA provisions exists, namely whether the OECD or other model commentary; explanatory memoranda or other

[58] With reference to legislation as existed at the time of the signing of the DTA

[59] Permitting changes to domestic legislation after the DTA is in force to be considered within the scope of the DTA

[60] See OECD Commentary particularly with reference to Article 3(2) and Vogel (1997: 65)

[61] The objective of the DTA clearly influences the courts. See *ITC 1544* where it refers: "It is common cause that it [the DTA] has not been revoked and that the arrangements *insofar as they relate to immunity, exemption or relief in respect of income tax* still have the effect of law" (*emphasis added*).

supplementary sources should be seen as part of the context of the DTA before resorting to the domestic legislation. It is submitted that while the commentaries and other sources are not part of the context, such sources may have bearing in determining a common intention between the states – a key determination of the "ordinary meaning" of the term in an international context and in terms of the VCLT. However, such reliance is contingent on whether such source would be recognised in the South African courts.

2.4.4. Status of the OECD Commentary in interpreting South African DTAs

The South African DTAs have largely been based on the OECD Model Convention. South African DTAs concluded over the years have also reflected the changes made to the OECD Model from time to time. The OECD Model has also had a direct effect on South African domestic legislation. The definition of "permanent establishment" in the South African ITA is a direct reference to the OECD Model Article 5 as determined from time to time (reflecting an ambulatory approach). It is unclear whether this usage would permit the courts to seek guidance from the OECD Commentary in interpreting the definition.

In *SIR v Downing* reference was made to the lower courts usage of the OECD Commentary, however the judge did not place any reliance on the commentary in the determination of the judgment.

That the South African treaties are largely based on the OECD Model may provide clarity on the status of the Commentaries to the OECD Model in the interpretation of South African DTAs. While the OECD Model has been used by South Africa over the years as a standard template for DTAs, South Africa is not a member of the OECD and has only recently achieved observer status. This use of the OECD Model may also reflect the bargaining power of the other Contracting State, rather than a South African approach. Similarly, the South African tax treaty with the United States of America reflects more of the USA and UN Model Treaties than the OECD. Again, this may refer to the bargaining power of the other Contracting State.

As discussed above, the VCLT as regards Articles 31 to 33 should be considered by the South African courts to be customary international law, and consequently law in South Africa. Whether the OECD Commentaries should be considered as customary international law and within the scope of Articles 31 (general rule of interpretation) and 32 (supplementary means

of interpretation) of the VCLT has been debated at length internationally and is by no means settled.[62]

2.4.4.1. OECD Commentaries at the time the DTA is entered into

Generally the OECD Commentaries are not considered as binding in international law. The OECD Commentaries themselves indicate as much. While the OECD Commentaries have not been declared customary international law in South Africa,[63] should they fall within the ambit of Articles 31 or 32 of the VCLT, they should be considered an interpretational tool in terms of customary international law. As regards the OECD Commentaries that existed at the time the DTA was concluded, most authors appear to be in agreement that the OECD Commentaries fall within Article 31 of the VCLT. [64]

Ward *et al* (2005) state that: "the commentaries existing at the time the treaty is concluded, when the bilateral treaty incorporates the wording of the [OECD] Model, although not legally binding, can be presumed to reflect generally the intentions of the treaty negotiators". In the supporting footnote (173) they add: "This is reinforced when, which is sometimes the case, the government when presenting a bill to parliament to implement a tax treaty in domestic law, refers to the fact that the treaty was based on the OECD Model".

[62] Ward *et al* (2005: 5) (The Interpretation of Income Tax Treaties with Particular Reference of the Commentaries on the OECD Model) illustrates this point where the authors state: "As is the case with the Commentaries themselves, we have not arrived at unanimity in our views. What we express as our views […] should be understood by the reader to be a wide, but not always full agreement of the authors".

[63] See *S v Petane* [1988] 4 All SA 88 (C) in which Judge Conradie, addressing the status of United Nations General Assembly resolutions, stated: "It does not follow, however, that such resolutions or declarations can be classified as *usus* giving rise to custom. They may constitute *opinio juris* which, if expressed with respect to a rule sufficiently delineated through *usus*, may create a customary rule of international law. To this extent Akehurst is correct in stating that 'when States declare that something is customary law it is artificial to classify such a declaration as about something other than customary law'. But if there is no preceding *usus*, such declaration cannot give birth to a customary rule, unless, of course, the declaration itself is treated as *usus* at the same time. However, it takes too wide a stretching of the concept of *usus* to arrive at the latter conclusion. *As was rightly observed, 'repeated announcements at best develop the custom or usage of making such pronouncements*'." (*emphasis added*). It is submitted that the OECD Commentaries fall within such regular announcements.

[64] Van Brunschot (2005) (Judge of Netherlands Supreme Court) states: "The maximum value of the Commentaries is that of an expert opinion of great weight. They have an *uncontested significance* for the interpretation of treaties *to the extent that they existed at the time a particular treaty was concluded*; the significance of the later versions of the Commentaries is less clear" (*emphasis added*).

In recent years, and with greater access to information, presentations by National Treasury and SARS to the Portfolio Committee on Finance (National Assembly) have indicated that the negotiated treaty is based on the OECD Model. Deviations from the OECD Model are then discussed, indicating that the OECD Model is the accepted base. While no mention is made of the OECD Model when the DTA is presented to Parliament, it is presented based on the recommendation from the Portfolio Committee on Finance.

Engelen (2004), citing Vogel as authority, states: "With respect to the interpretation of treaties with or between non-member [of the OECD] States, […] an intention to conform to the Commentaries for the purposes of interpretation may only be presumed if the text of the treaty is identical to that of the OECD Model […] and the context suggests no other interpretation". As only an observer to the OECD, this comment is clearly, and it is submitted correctly, applicable to South Africa.

For this reason, it is submitted that the OECD Commentary has a definite place in determining the common intention of the negotiating states (see above and fuller discussion below). The OECD Commentaries at the time the DTA was signed can certainly be used to assist in the interpretation of the DTA, where such DTA was based on the OECD Model. It is further submitted that the OECD Commentaries must have been in the minds of the negotiators at the time the DTA was being negotiated.

It should be noted that the reference to Ward *et al* (2005) above was considering only the commentaries as at the date that the DTA was signed and not the later commentaries (the later scope of their work). The status of the OECD Commentaries in South Africa after the DTA is signed must therefore be considered.

2.4.4.2. Later OECD Commentaries

OECD Commentaries concluded after the signing of a bilateral DTA have been classified by "Waters, then the chairman of WP1 [Working Party 1], but expressing his personal views" as: (a) filling a gap in the existing commentaries by covering matters not discussed at all; (b) amplifying existing commentary by adding new examples or arguments supplementing what

is already there; (c) recording what states have been doing in practice; and (d) contradicting previous commentary.[65]

In deciding domestic income tax cases, it is clear that the courts will take into account only the legislation in force at the time the transaction took place.[66] Domestic legislation is, however, subject to regular amendment, whereas the DTAs are presumed to be capable of lasting for some time.[67] An ambulatory approach is therefore critical to the life of a DTA to take into account subsequent amendments to the two states domestic legislation i.e. to be equally applicable to the changing domestic legislation. To what extent that ambulatory approach should be extended to the OECD Commentaries and their use in interpretation of DTAs needs to be considered.

Just as the OECD Commentaries existing at the time the DTA was signed would have a persuasive effect in the South African courts where a DTA was based on the OECD Model, it is submitted that certain of the later commentaries should be considered to also have a persuasive effect and others[68] should not be taken into consideration by the courts.

For each of the four categories of later commentaries referred to in (a) to (d) above, there are arguments for and against the use of each. However, it is submitted that the use of the later commentaries would have to be decided on a case-by-case basis. For example, the "gap-filling" (in (a) above) commentary may have been introduced to discuss technological advances that could not have been contemplated at the time the treaty was negotiated but at the same time the treaty should be extended to cover that type of transaction (just as the domestic law would be amended each year to adjust to a changing business world).

[65] See Ward *et al* (2005: 79)

[66] In Chidi v Minister of Justice [1992] (4) SA 110 (A), Smalberger JA stated: "It is a well-known rule of interpretation that a statute, unless a contrary intention appears, is prospective in its operation - it regulates future conduct and does not apply to past events".

[67] A minuted comment made by Mr Frans Tomasek (General Manager: Legislative Policy, SARS) in a meeting of the Portfolio Committee on Finance (National Assembly) was that: "treaties usually remained in place for ten to twenty years before they were revised. There was an extensive process of negotiation and ratification. Thus renegotiating an international treaty was not something undertaken easily. They [SARS] needed to draft a treaty that could be there 'for the long haul'.".

[68] Such as certain contradictory commentary that has the effect of changing the interpretation of the article in a way that could not have been contemplated by the negotiators. Note that there are exceptions (see later).

Added examples and other forms of commentary merely extending the existing interpretations could also be considered. Recording of state practice and contradiction of previous commentary would have to be considered carefully. Firstly, other states' practices may have no bearing on South Africa and the other Contracting State in the relevant bilateral DTA. Secondly care would have to be exercised where one of the Contracting States practice is recorded, but not necessarily agreed to by the other State (for example, by exchange of notes or the entering into of a Protocol).

The greatest of care should be exercised when reviewing contradictory commentary. If it is accepted that the commentary existing at the time the DTA was entered into falls within the interpretation rules of the VCLT and an interpretational tool in terms of customary international law, a later contradiction may have a direct bearing on the transaction. As Avery-Jones (2002) points out in his summary of the 2001 OECD Seminar of the IFA Congress: "Neither tax authorities nor taxpayers are reluctant in practice to refer to the current Commentaries in interpreting older treaties". Would the courts be bound to follow the OECD Commentaries at the time the DTA was signed? It is submitted that the OECD Commentaries are merely an interpretational tool assisting the courts. The courts are not bound by the OECD Commentaries. If the transaction under consideration falls within the ordinary meaning of the terms in the DTA, it is submitted that the court will apply the DTA to such a transaction, despite any contradictory commentary.

2.4.4.3. Conclusion on the status of the OECD Commentaries

The uncertainty as to the status of the OECD Commentaries in international circles and the varied use by the foreign courts of the OECD Commentaries in the interpretation of DTAs would, it is submitted, result in the South African courts reluctance to declare the OECD Commentary customary international law. At best the OECD Commentary may be an interpretational tool in terms of customary international law and have a persuasive effect where clarity is sought for a particular term used i.e. may assist in the interpretation of the context.[69] However, it is more likely that judges of South African courts will determine the meaning of the article from the text and the purpose of the DTA, referring to the OECD Commentary only as a limited persuasive source of interpretation.

[69] See again comment by Van Brunschot (2005: footnote 54)

2.4.4.4. Other Model treaties

Other Model treaties such as the UN Model and the USA Model occasionally influence the South African negotiators. Generally speaking, the UN Model will have some effect on South African treaties with other African countries whereas the USA Model impact is reserved for negotiations with the USA.

The impact that the commentaries to the UN Model will hold is submitted to be the same as that for the OECD Model. However, the USA Model is unlikely to be consulted for general interpretation of South African DTAs as only the USA-South Africa DTA is based on the USA Model and supported by a USA Technical Explanation. While this is a unilateral document prepared by the USA, it may have a persuasive effect on the South African courts if it can be shown that the technical explanation was referred to during the course of the negotiations (i.e. was in the mind of the South African negotiators).[70]

2.4.5. Multilingual DTAs

The South African courts have not been presented with any cases concerning different interpretations arising from different linguistic versions of a treaty. The South African Constitution addresses the issues within the context of domestic legislation. Section 65(2) of the Constitution provides: "In the case of a conflict between copies of an Act [...], the copy signed by the President shall prevail". Where there is no conflict but the intention of the Legislature is to be determined, the courts will attempt to reconcile the two versions and interpret the term in accordance with the intention of the Act.[71]

In the case of multilingual treaties, both copies are generally signed and the languages given equal authority.[72] However, in some treaties the dispute resolution mechanism is identified in the treaty, for example, the South African DTA with Spain provides that disputes are to be settled using the English version of the DTA.

[70] Unless it can be shown that the negotiators of other South African DTAs referred to the USA Technical Explanation, its use will be limited to the USA-South Africa DTA in the South African courts.

[71] See for example the Constitutional Court decision in *Zulu and others v Van Rensberg and others* [1996] 2 All SA 615 in which the court decided to reconcile the English and Afrikaans terms by adopting the broader interpretation.

[72] See for example the South African DTA with Brazil

Where equal weight is given to both languages and the dispute resolution mechanism has not been identified, it is submitted that the courts should attempt to reconcile the two terms in the context of the objective of the DTA.

This approach also appears consistent with Article 33 of the VCLT.[73]

2.5. CONCLUSIONS

This chapter provides the methodological approach to the interpretation of the withholding tax on sportspersons and the South African DTA articles (as discussed in the later chapters).

The rapid reintroduction of South Africa to the international community has resulted in the negotiation and ratification of 57 of the 64 DTAs in force at 1 June 2008, with older treaties in the process of renegotiation as well as new treaties being negotiated with those States not yet in the South African DTA network.

Furthermore, the business world is constantly evolving as new technologies and concepts are regularly introduced. The domestic fiscal legislation and the DTA network need to keep pace with these innovations. While domestic fiscal legislation in South Africa is amended twice per year, DTAs are intended to last for a significant time before the extensive process of negotiation and ratification is again pursued.

To adjust to international changes, new domestic fiscal legislation has been drafted using a number of different countries as sources. All this new legislation and the existing DTAs must be interpreted in accordance with the interpretational rules available.

Domestic legislation is largely interpreted using a literal approach i.e. the text is examined to interpret the intention of the Legislature. Deviations from the text occur where the intention is clear, but the text does not give effect to such intention. Where the meaning is plain, effect is given to such meaning. Foreign decisions and other foreign legal sources have a persuasive effect in the South African courts, but generally do not create any precedent.

The DTAs, ranking equally with the domestic fiscal legislation in terms of section 108 of the ITA, fall within the jurisdiction of the South African courts. Adding to the interpretational

[73] For a detailed discussion on the VCLT effect on multi-lingual treaties, see Engelen (2004: 381-413).

tools available for domestic fiscal legislation are those in customary international law. In interpreting the terms of the treaty, regard will be had to the text and the context in which the term appears. The context will be examined in light of the purpose of the treaty.

The OECD Commentary itself is not customary international law, however, the commentaries in existence at the time the DTA was entered into may be used as an interpretational tool of customary international law. The later commentaries (those entered into after the DTA was signed) may be used by the courts, as an ambulatory interpretational basis is preferred, but those commentaries that modify the meaning as existed at the time the DTA was entered into are likely to be disregarded.

Where the DTA Article deviates from the OECD Model, the OECD Commentary may no longer be appropriate. The court may still refer to the OECD Commentary for clarification of a term if it is of the opinion that the relevant term is used in a similar context. Similar considerations will apply where the South African negotiators have used other model treaties and the relevant commentaries (for example the UN Model or USA Model treaties and related commentaries).

The above interpretation rules provide the methodology for the analysis of the domestic law and the South African DTA articles as discussed in the later chapters.

CHAPTER 3

THE SOUTH AFRICAN INCOME TAX LAW RELATING TO INTERNATIONAL SPORTSPERSONS

3.1. INTRODUCTION

The main objective of this Chapter is the analysis of the South African implications of the new withholding tax on sportspersons ("withholding tax" hereinafter) without considering the impact of any South African DTAs. This is the equivalent position for a non-resident sportsperson ("sportsperson") from a State with which South Africa has not concluded a DTA. The domestic income tax legislation is analysed in isolation from DTAs in order to assess the South African taxation consequences and the interpretation of the legislation using the rules stipulated in Chapter 2. Furthermore isolating the South African tax consequences assists the contrast between the South African tax and DTA treatment of sportspersons in later Chapters.

Sportspersons can naturally earn a wide variety of incomes, from the amateur sportspersons whose sporting activities are ancillary to their main occupation to the professional sportspersons receiving image "royalties", performance and appearance fees, sponsorships and the like. Critical to the application of the withholding tax is the identification of a sportsperson. Section 3.2.2 addresses the question of who is a sportsperson in terms of the withholding tax to assess how wide the fiscal net has been cast.

The various income streams of sportspersons, from amateur to professional, are considered in the context of the South African income tax system. If the income is from a South African source, the income (in the absence of a DTA) falls to be taxed in South Africa. There are two systems of income taxation for South African sourced income of sportspersons, namely normal tax (on a net basis and determined using progressive rates) and the withholding tax (at a flat rate on gross receipts). Whether the income will fall within the normal tax or the withholding tax systems is assessed. If subjected to withholding tax, normal tax may not be levied on the income. Section 3.2.3 then identifies the scope of the "specified activity", the cause of the income to be taxed in terms of the withholding tax.

Incomes falling outside the scope of the "specified activity" yet remaining of a South African source fall to be taxed in terms of normal tax. The South African "source" principles applicable to sportspersons therefore require discussion. Furthermore, as sportspersons are highly mobile earners, the matter of apportionment of their income is analysed. Section 3.2.4 discusses the South African income tax principles applicable to sportspersons, including source and apportionment.

Section 3.2.5 analyses various income streams in the context of the South African ITA. Only incomes related to the sportspersons activities as a sportsperson are discussed, for example "royalties" for use of the professional sportsperson's "brand" are discussed whereas interest earned on a South African interest bearing investment and similar passive income streams are not. The identification of the source of the income is critical irrespective of whether the income is taxed in terms of normal tax or withholding tax (see section 3.2.4). Cash and non-cash forms of payment or reward are analysed in section 3.2.5.

The normal tax system taxes on a net basis. Certain expenses incurred by the sportsperson for incomes not subjected to withholding tax may be allowed as deductions against such incomes. Section 3.2.6 analyses the rules pertaining to deductions that may be applicable for sportspersons against income taxed in terms of the normal tax rules.

Section 3.3 of this chapter provides a detailed analysis of the withholding tax against the general source normal tax approach. This analysis is in the context of the stated objective of the legislation as contained in the Explanatory Memorandum to the Bill that introduced the withholding tax.

The detailed analysis of the withholding tax will also review any anti-avoidance measures in place to counteract the international practice of "rent-a-star" companies (i.e. entities interposed to avoid tax liability in the state of source).

The withholding tax rate is compared against the normal tax rates applicable varying the level of permissible deductions against the income subject to normal tax. The objective is to identify any fiscal advantage in levying withholding tax in preference to normal tax.

Finally section 3.3 analyses whether collection of normal tax from sportspersons prior to the introduction of the withholding tax should ever have been a problem i.e. were there sufficient

collection mechanisms available before the introduction of the withholding tax negating the need for such a tax. If, for example, the sportsperson was employed in South Africa, or had another form of presence in South Africa (through a permanent establishment, property investment or similar), was there a need to introduce the withholding tax?

The above questions will identify the application and necessity (or lack thereof) of the withholding tax on non-resident sportspersons.

3.2. INCOME TAX ASPECTS OF INCOME FROM SPORTS ACTIVITIES

3.2.1. Introduction

As discussed in Chapter 2, non-residents are taxed on South African source income only. As non-resident sportspersons performing in South Africa is the topic of this thesis, the implications for residents are not discussed, except where relevant to the discussion of the consequences for the non-resident.

Sportspersons are potentially liable for two different types of taxes on income. They may be subjected to withholding tax on the gross amounts paid for any "specified activity" in South Africa. Amounts that are not considered related to the specified activity but still of a South African source would be subject to South African normal tax. This distinction is critical to the tax treatment of amounts received by or accrued to sportspersons as withholding tax is applied against the gross amount, whereas if normal tax applies the sportsperson may qualify for deductions against their income. It should be noted that there is no taxpayer election as to which method may be applied.

The term "sportsperson" (as defined in section 47A of the ITA) is analysed in 3.2.2. A person must qualify as a sportsperson or entertainer before the withholding tax is applicable. Next, the term "specified activity" is analysed to establish its scope (see 3.2.3.). General income principles applicable to both normal tax and the withholding tax are analysed (see 3.2.4) to facilitate the later discussion. Income types (including reimbursed expenditure) are then analysed and classified (see 3.2.5.) as being subject to: the withholding tax, normal tax or neither.[74] The types of deductions permissible for the purpose of normal tax are identified

[74] The same income cannot be subject to both withholding tax and normal tax as when the withholding tax applies, the income is exempt from normal tax – see section 10(1)(l) of the ITA.

(see 3.2.6.). The consequences of the classification of income as being subject to normal tax or withholding tax are discussed later in this Chapter (see 3.3).

The various types of income ultimately taxed in South Africa (whether by withholding or in terms of normal tax) remain subject to the relevant double tax agreement and the nature of the income. The DTA consequences and analysis are discussed in later chapters. However, where necessary, DTA implications are also discussed in this part.

3.2.2. Defining the "sportsperson"

Section 47A of the ITA contains the only definition of "sportsperson" in the Act. The definition provides that:

> "'entertainer or sportsperson' includes any person who for reward –
>
> (i) performs any activity as a theatre, motion picture, radio or television artiste or a musician;
>
> (ii) takes part in any type of sport; or
>
> (iii)takes part in any other activity which is usually regarded as of an entertainment character"

It is submitted that (ii) and (iii) are the parts of this definition that are most likely applicable to sportspersons. Part (iii) is submitted to include those activities, for example, a sportsperson recording an advertisement, related to the sport performed by the sportsperson as long as that activity has an entertainment character.

As the withholding tax was only introduced with effect from 1 August 2006, no official guidance as to the interpretation of these terms exists. The normal interpretation rules (discussed in Chapter 2) must therefore be applied and the ordinary meaning of the terms in context needs to be identified.

The phrase "any type of sport" should, it is submitted, be interpreted as widely as possible. The ordinary meaning of the word "sport" is equally as broad including more than the usual athletic activities most commonly associated with the term. Sports from Olympic events to golf would be encompassed by the term. Indeed sport includes "an[y] activity involving

physical exertion and skill in which an individual or team competes against another or others for entertainment".[75]

The person must also "take part" in that sport. Synonyms for such a phrase include: participate, "engage, join, get involved, share, play a part/role, be a participant, partake, have a hand in, be associated with, cooperate, help, assist, lend a hand".[76] There is no official guidance as to how wide the net has been cast, for example whether agents representing the sportspersons are considered themselves "sportspersons" by their association. It is submitted that the link of an agent's commission to the actual performance of the sportsperson, for example, may be too remote to be considered of a South African source (see 3.2.4.3. below). However, other persons may well fall within the ambit of the provision. The Australian Tax Office ("ATO") guide[77] includes in the Australian system of withholding: bodyguards; coaches; doctors; personal trainers; physiotherapists; sports psychologists as examples of support staff that fall within the ambit of their system. It is submitted that similar persons associated with the sport activity in South Africa would also fall within the system of withholding. As the persons associated with the sporting activity (e.g. coach etc.) are just as transitory as the person performing the sport, it appears correct that such persons equally fall within the scope of the definition.

Definitions of sportsperson (including references to sportsmen and sportswomen) do not carry any particular references to amateur or professional participation in the sport.[78] However, the definition of sportsperson for the purposes of the withholding tax requires the participation to be "for reward".

[75] "sport" The Concise Oxford English Dictionary, Eleventh edition revised. Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2006. Oxford Reference Online. Oxford University Press. [23 July 2008] [http://www.oxfordreference.com.ezproxy.uct.ac.za/views/ENTRY.html?entry=t23.e54534] [by subscription]

[76] "participate" The Oxford Paperback Thesaurus. Ed. Maurice Waite. Oxford University Press, 2006. Oxford Reference Online. Oxford University Press. [23 July 2008] [http://www.oxfordreference.com.ezproxy.uct.ac.za/views/ENTRY.html?entry=t24.e9212] [by subscription]

[77] Australian Tax Office guide: "Withholding from payments to foreign residents for entertainment or sports activities" [http://www.ato.gov.au/businesses/content.asp?doc=/content/46256.htm&pc=001/003/024/002/013&mnu=659&mfp=001/003&st=&cy=1]

[78] In an international context, refer to Holmes (2007) at 321, Vogel (1997) at 976.

Amateur, in relation to sports, is defined in the Merriam-Webster Online Dictionary as "one who engages in a […] sport as a pastime rather than as a profession".[79] Within the descriptive text of "amateur" the work adds that amateur "in sports […] may also suggest not so much lack of skill but *avoidance of direct remuneration*" (*emphasis added*). "Professional" in contrast is defined as "*participating for gain or livelihood* in an activity or field of endeavor often engaged in by amateurs" (*emphasis added*).[80]

The Oxford Dictionary of English cites an "amateur" as "a person who engages in a pursuit, *especially a sport, on an unpaid basis*" (*emphasis added*).[81] In contrast, a "professional" is defined as "engaged in an activity as a *paid occupation* rather than as an amateur" (*emphasis added*).[82]

It is therefore clear that the amateur (in a strict sense) includes only the unpaid sportsperson (not contemplated within the definition for withholding tax purposes), whereas the sportsperson receiving reward is a professional. While there could be varying degrees of reward, it is submitted that any reward would be sufficient for the person to be contemplated within the withholding tax definition.

3.2.3. The scope of "specified activity"

Section 47A of the ITA defines the term "specified activity" as meaning "any personal activity exercised in the Republic or to be exercised by a person as an entertainer or sportsperson, whether alone or with any other person or persons".

[79] "amateur." Merriam-Webster Online Dictionary. 2008. Merriam-Webster Online. 13 August 2008. <http://www.merriam-webster.com/dictionary/amateur>

[80] "professional." Merriam-Webster Online Dictionary. 2008. Merriam-Webster Online. 13 August 2008. <http://www.merriam-webster.com/dictionary/professional>

[81] "amateur noun" The Oxford Dictionary of English (revised edition). Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2005. Oxford Reference Online. Oxford University Press. University of Cape Town. 13 August 2008
<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t140.e2118>

[82] "professional adj." The Concise Oxford English Dictionary, Eleventh edition revised . Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2006. Oxford Reference Online. Oxford University Press. University of Cape Town. 13 August 2008
<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t23.e45064>

There appears to be an error in the language used in this definition. The phrase "or to be exercised" has not been qualified by the phrase "in the Republic". It is submitted that while a *casus omissus*[83] exists, the court would be able to interpret the language around it sufficiently to arrive at the intention of the legislature, namely to trap by means of a withholding tax amounts that would otherwise be subject to tax in South Africa i.e. South African source income earned by a non-resident sportsperson. This implies that the phrase should be read as "to be exercised in the Republic".

The Explanatory Memorandum to the Revenue Laws Amendment Act 31 of 2005 explains the introduction of the withholding tax as follows: "It is an internationally accepted practice that foreign entertainers and sportspersons are liable for income tax in the specific countries in which they perform. South Africa's ability to collect this tax is not as effective as it should be due to numerous practical constraints. One of the main contributors to these constraints is the short period of time for which the non-resident entertainer or sportsperson is physically present in the country".

From this extract, a critical conclusion can be drawn: the aim of the withholding tax is to ensure collection of amounts for which the sportspersons would themselves otherwise be liable in terms of normal tax. As the amounts for which the sportsperson could be liable would have to be from a South African source, it is clear that the "specified activity" can only be considered a sub-set of South African source.

In conclusion, the amounts received or accrued to the sportsperson would have to be of a South African source before qualifying as an amount from the "specified activity".

3.2.4. General income principles applicable to sportspersons

Sportspersons, particularly the international stars can generate income from a variety of activities. It is therefore necessary to discuss the broad principles applicable to income.

[83] "[I]n accordance with the principle that the court's function is to interpret the law and not to legislate, that the courts will not fill a *casus omissus*, or an apparent gap, in a statute. However, the court will interpret a statute so as to avoid a *casus omissus* when its language makes this reasonably possible. When another construction, a reasonable construction, may be put upon an Act of Parliament, a court of law should not readily infer a *casus omissus*, and where a word in an Act is capable of two meanings, that meaning which is in accordance with the rest of the Act should rather be given to it" (Clegg *et al*, 2007: 2.1). Supported by De Koker (ed) (2007) at 25.11.

Thereafter South African source rules are discussed before an analysis can be made of the specific income within the withholding tax scope. A conclusion is then drawn as to which types of South African source income would be included in the scope of the withholding tax provisions applicable to sportspersons.

3.2.4.1. Amounts received or accrued

The phrase "amount received or accrued" is analysed as it appears not only in a normal tax context (in the definition of gross income) but is also used in the withholding tax provisions (in section 47B concerning the imposition of the withholding tax). The consistent use of the phrase and the context in which it is used is sufficient, it is submitted, to draw the same meaning.[84] This phrase is used throughout the ITA with the same inference, so Clegg *et al*'s (2007) cautionary note concerning the use of the same language by different draftsmen in different contexts (see Chapter 2.3.1.) is inapplicable.

The term "amount" has been found to mean money or any property that can be valued in money,[85] for example, payment in kind.

The term "received" has been interpreted by the courts as "received by the taxpayer on his own behalf for his own benefit".[86] The meaning of accrual was debated by the courts yielding the conclusion that the term should be interpreted to mean an amount to which the taxpayer has become unconditionally entitled.[87]

The courts also considered whether an amount that accrues but will only be received at a later date should be included at face value or a discounted value (present value). In *CIR v People's Stores (Walvis Bay) (Pty) Ltd*, the courts found in favour of the latter principle. This decision was followed with an amendment to the gross income definition, adding a proviso which states: "Provided that where during a year of assessment the taxpayer has become entitled to any amount which is payable on a date falling after the last day of such year, there shall be deemed to have accrued to him during such year […] such amount". The intention of this amendment was to force the taxpayer to include the face value of the amount in his taxable

[84] Refer in Part 1 for the reason for this conclusion.

[85] *CIR v People's Stores (Walvis Bay) (Pty) Ltd* (1990) 52 SATC 9 and *Cactus Investments (Pty) Ltd v CIR* (1999) 61 SATC 43

[86] *Geldenhuys v CIR* (1947) 14 SATC 419

[87] *WH Lategan v CIR* (1926) 2 SATC 16 and confirmed by *People's Stores* (*supra*)

income in the year in which the accrual took place. Whether the insertion of this proviso has achieved this objective is still debated, but has not yet been challenged in a court of law. The SARS approach is to include the face value of the amount.

It is interesting to note that while the proviso appears in the gross income definition, no similar proviso has been inserted into the withholding tax provisions. It is therefore submitted that only the present value of an amount that accrues in one year and which will only be received in a subsequent year need be subject to the withholding tax in that year as per the Appellate Division[88] decision of *People's Stores (Walvis Bay) (Pty) Ltd.*

Not addressed in these court decisions was the effect of the release of "value" between the date of accrual and the date of receipt. De Koker (ed) (2007) submits that the difference between the face value and discounted value must be recognised in the year of receipt where only the present value was recognised on accrual.[89] It is submitted that this approach would be correct if the receipt followed in the immediately succeeding year. However, if such receipt was only to be recognised a number of years after the accrual, it is submitted that at the end of the intervening year of assessment, revised "accruals" would have to be determined as the debt owed to the taxpayer would have "increased" by the value released. De Koker (ed) (2007) also indicates that while the excess over the accrual value could be considered on receipt there is no corresponding treatment for a receipt of less than the accrued amount i.e. relief would have to be sought elsewhere in the ITA. It is submitted that possible relief rests in the bad debts deduction.[90] However, being a deduction, this provision would only be applicable for amounts subject to normal tax. There would appear to be no relief in the ITA if a larger accrual was subjected to withholding tax than was actually received. Relief could, in these circumstances, be found in a claim in terms of the law of contract.

[88] Now the Supreme Court of Appeal, the highest court for non-constitutional matters

[89] It is clear from *People's Stores (Walvis Bay) (Pty) Ltd supra* and *SIR v Silverglen Investments (Pty) Ltd* (1969) 30 SATC 199 that only the amount is not included both when accrued and received but on the earlier event. As a discounting would only partially include the amount, the difference would have to be accounted for on the earlier of receipt or accrual.

[90] In the context of employment, proposed legislation will permit a deduction for an employee where remuneration must be refunded. This, however, implies that the remuneration must have been first received whereas in this above situation, the amount that accrued is greater than the amount ultimately received. Recourse may yet be had to the bad debts provision.

In summary, where subject to the withholding tax, a sportsperson must include an amount, whether in cash or otherwise, on the earlier of the receipt or accrual. If the sportsperson is unconditionally entitled to the amount, but will only receive such amount in the future, the amount must be valued for inclusion as an accrual. Furthermore, as the "discount" is released, the sportsperson will have to recognise the "discount" that accrues if such amount accrues before receipt. This will have a direct impact on the tax withheld (see later). Should the sportsperson not be subject to the withholding tax but still found to have received an amount from a South African source, such amount would have to be included in gross income for normal tax purposes at face value.

3.2.4.2. South African source

As discussed in 3.2.3 above, any amount received by or accrued to a sportsperson from performing a specified activity would have to be of a South African source to fall within the scope of the withholding tax. In addition, amounts outside of that scope but still of a South African source would be subject to normal tax in South Africa. Each of these types of tax would be subject to the provisions of the DTAs (see later chapters) if an applicable DTA exists.

Before the detailed discussion of the various income types of sportspersons, an analysis of the fundamental rules of South African source is provided. "Source" is not defined in the ITA and it has largely been left to the courts to define. For this reason, South African source is divided into two categories: true source based on decisions of the South African courts (forming part of South African common law – see Chapter 2) and deemed (legislated) source that deems amounts that would not necessarily qualify as true source to still be of a South African source.

The principle test for true source used in South Africa can be derived from the Appellate Division decision in *Lever Brothers and Unilever Ltd.*[91] Watermeyer, with the caveat that it was probably impossible to provide a universal test for source, provided a two-step process. Firstly the originating cause of the income had to be identified. This was usually the work done or activity undertaken (and in other cases has been where the capital was employed) which generated the income. Secondly, the location of the originating cause had to be found.

[91] *CIR v Lever Brother and Unilever Ltd* (1946) 14 SATC 1

In cases where a multitude of originating causes is identified, the dominant originating cause must be found. Such dominant originating cause will be considered the source of the income. Only where such dominant originating cause crosses national borders will the courts consider apportionment. Kruger *et al* (2003) summarises the issue of apportionment as follows: "An apportionment of income on the basis of the source of that income, is only made where the originating cause, be it the sole originating cause, or the main or dominant originating cause, is located both within and outside South Africa. If there are two sources, i.e. originating causes, one inside South Africa and the other outside, the all-or-nothing rule applies; and the location of the main source will determine the fate of the income". Kruger *et al* (2003) provides the following example: "it may be found that the main originating cause of the income is services rendered by the taxpayer; and that those services were rendered partly in South Africa, and partly outside the country. When that happens an apportionment must be made. This accounts for the fact that the courts have had no hesitation or difficulty apportioning amounts received for services rendered partly within and partly outside the country".[92]

In summary, apportionment is only made when the main or dominant originating cause spans more than one country. Where separate originating causes exist in each country for the same income, the main or dominant cause must be identified i.e. there is no apportionment where the identified dominant cause is located in one country.[93] It is submitted that this is the correct approach, however only where the real dominant cause is identified. Where two equally dominant causes are identified in two different countries, apportionment may also be appropriate (see the example of *Tuck v CIR* below).

Note that the above issue of apportionment relates to the same income spread over a single originating cause. This is not comparable to the circumstances in the case of *CIR v Black*[94] in which it was found that the taxpayer was conducting similar but distinct businesses, one in South Africa and the other outside of South Africa. The court found that the business activity outside of South Africa had as its originating cause the capital there employed. Similarly the

[92] Kruger *et al* (2003) further cites *ITC 1104* (1967) 29 SATC 46; *ITC 837* (1957) 21 SATC 413 and *ITC 396* (1937) 10 SATC 87 as examples.

[93] See for example *CIR v Epstein* (1954) 19 SATC 221 referred to in the judgment in *CIR v Black* (1957) 21 SATC 226 (at 235) in which all of Epstein's business activities were conducted in South Africa and hence the dominant cause of the income was of a South African source.

[94] (1957) 21 SATC 226 at 234-235

capital employed in South Africa represented the originating cause of the South African income. Two distinct income streams from two distinct businesses were evident. The courts did not apportion the income in this case, but rather allocated the distinct business income to each business.

The case of *Tuck v CIR*[95] considered a single amount payable in relation to services rendered and restraint i.e. revenue and capital. The source of the amount was not in question. The court seemingly applied a source-type test in that it found that the amount was derived equally from each element i.e. two equally dominant originating causes. The court apportioned the amount between its revenue nature and its capital nature. It is submitted that this is correct. The nature of the amount was in question and not the source from which it was derived. If in a case involving the source of the amount, two originating causes were found to be exactly equal, neither dominant, it is submitted that apportionment would be necessary.[96]

In the context of sportspersons' income, the above tests are of critical importance. For example, a sportsperson under contract to perform worldwide would have as an originating cause the service rendered. As that originating cause spans different countries, apportionment of such income would be necessary. In contrast, the sportsperson enters into a contract to endorse a product in an advertisement for which the remuneration is based on the number of times the advertisement is shown. The advertisement is flighted worldwide. The originating causes could include: the contract; the filming of the advertisement or the countries in which the advertisement is shown. One of these causes must be identified as the main or dominant originating cause and the location of that cause will be the source of the income. If the originating cause is the flighting of the advertisement, an apportionment would have to be made.

It is clear from the body of case law that the exact facts and circumstances are critical in identifying the main or dominant originating cause and finding the location of such cause. Subtle differences in facts and circumstances can yield different results.

Since the change to a residence based system of taxation, a number of the source provisions previously in the ITA were repealed. Those that remain are few and specific. The table

[95] (1988) 50 SATC 98

[96] See also Meyerowitz (2008) at 7.17 and citing as support *ITC 1103* (1967) 29 SATC 35

below summarises the deemed source provisions that will be discussed when relevant in the specific income types.

Section	Description of scope
9(1)(b)	Right of use of intangible property in South Africa
9(1)(bA)	Imparting or undertaking to impart knowledge of a scientific, technical, industrial or commercial knowledge or assistance with the application or utilisation of such knowledge in South Africa
9(1)(cA)	Contracts for the disposal of mining rights per relevant Acts
9(1)(e)(i)	Services performed for any sphere of South African Government or municipality where funded in the main by funds voted by Parliament
9(1)(e)(ii)	Amounts for holding of South African public office or Act of Parliament
9(1)(g)(i)	Pension granted by any sphere of South African Government or municipality
9(1)(g)(ii)	Pension from any other source if the related services were performed in South Africa for at least two of the last ten years of service (inclusion is the ratio of years of service in South Africa to total years of service)
9(1)(h)	Relates to maintenance orders predating March 1962
9(2)	Capital gains source: For non-residents amounts arising from the sale of immovable property in South Africa (including certain indirect holdings in immovable property) or any amounts arising from the sale of movable property attributable to a permanent establishment in South Africa
9(6) and 9(7)	Deems interest earned to be of a South African source if the funds are utilised or applied in South Africa

3.2.4.3. The "causal link" to the income

The general gross income definition for normal tax purposes will include amounts received by or accrued to non-residents from a South African source. The gross income definition is supplemented with a number of specific inclusions. These specific inclusions can override certain aspects of the general gross income definition. For example, paragraph (a) of the gross income definition includes in gross income all annuities whether or not of a capital nature.

Special inclusion paragraph (c) of the gross income definition requires the income received or accrued to be "in respect of" services rendered or by virtue of employment. Such language implies that there must be a causal link between the income and the activity before such

income can be recognised.[97] The withholding tax applicable to sportspersons requires all income received by or accrued to the sportsperson to be "in respect of" the specified activity. It is submitted that the case law concerning the causal link in respect of income from services rendered is equally applicable to the use of the phrase "in respect of" for withholding tax purposes. Furthermore, a causal link between the sportsperson's activities and the income earned will be required before the amount can be subjected to withholding tax. Should the amount be found not to have the causal link but remain of a South African source, it is submitted that the normal tax rules will apply. This implies that while certain of the sportspersons income from a South African source will be taxed in accordance with the provisions of the withholding tax, other incomes will be taxed in terms of normal tax.

For the imposition of the withholding tax there must be a direct causal link between the specified activity and the amount received. In identifying the direct causal link (as implied by the use of the phrase "in respect of"), only the *causa causans* (or immediate/dominant cause) is relevant to the exclusion of the *causa sine qua non* (or another cause – but not necessarily the immediate/dominant cause) i.e. while a number of related causes may have influenced the receipt, the question to be answered is: what is the immediate cause?[98]

It must be noted that where such causal link is absent, the amount is not necessarily free of South African tax. It is merely free of the withholding tax on the specified activity. Should the amount received by or accrued to the sportsperson still be deemed to be of a South Africa source, the normal tax consequences would have to be considered.

3.2.4.4. Amounts of a capital nature

The gross income general definition excludes amounts received by the taxpayer that are of a capital nature. However, such exclusion may be overridden by a special inclusion paragraph. A number of special inclusion paragraphs override the capital nature of the amount resulting in such amount being included in gross income. Many of these overriding special inclusion paragraphs do so by omitting the qualifying phrase "not of a capital nature".

[97] *Stander v CIR* (1997) 59 SATC 212 and again in *CSARS v Kotze* (2002) 64 SATC 447

[98] *CSARS v Kotze* (2002) 64 SATC 447 at 452

The services inclusion, paragraph (c) of gross income, has been found to override the capital nature of the amount received or accrued, for example in respect of voluntary awards.[99] All that is required is a direct causal link between the capital amount received and the services rendered for the amount to be included in gross income. While the withholding tax provisions do not include a reference to voluntary awards, it is submitted that the withholding tax provisions do not exclude amounts received by sportspersons that are of a capital nature, provided there is a direct causal link between the amount received and the specified activity. Where such causal link is absent, the capital amount received by or accrued to the sportsperson would have to be determined in the context of the normal tax rules, in some cases excluded and in others included in gross income. Capital amounts not contemplated within gross income (or the special inclusions) would have to be analysed in the context of the capital gains tax provisions (also forming part of normal tax).

3.2.4.5. The employed versus the independent sportsperson

Whether a sportsperson is independent or employed often depends on the type of sport played. For example, golfers would generally be independent sportspersons and rugby players employed. For the purposes of the withholding tax against sportspersons, whether the sportsperson is employed in South Africa is of key concern. If employed by a resident employer and the sportsperson is physically present in South Africa for more than 183 days in aggregate for a twelve month period beginning or ending in the year of assessment in which the specified activities are exercised, the amounts received or accrued are not subject to the withholding tax. It does not matter whether the employment is related to the sporting activities or not. It is submitted that the rationale for this approach is that the employment has created a significant enough link with South Africa that other sources of income can be pursued to recover normal tax, therefore the withholding tax need not be applied.

[99] Paragraph (c) of gross income includes: "any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered or any amount […] received or accrued in respect of or by virtue of any employment or the holding of any office: Provided that:
(i) the provisions of this paragraph shall not apply in respect of any benefit or advantage in respect of which the provisions of paragraph (i) [fringe benefits – non-cash awards by virtue of employment] apply;
(ii) any amount received by or accrued to or for the benefit of any person in respect of services rendered or to be rendered by any other person shall for the purposes of this definition be deemed to have been received by or accrued to the said other person".

As this thesis is concerned with non-resident sportspersons, irrespective of employment, the source of the income and the causal link with the specified activity is key in establishing the tax effects (whether normal or withholding tax applies). As employment in South Africa (with the requisite stay) is an exclusion from the withholding tax but an inclusion for normal tax, it is not necessary when discussing income types to distinguish between the two.

3.2.5. Identifying the source of income from sporting activities

The wide variety of sports played around the world and the related professions results in a diverse list of the types of income that can be earned by sportspersons (widely defined as including support staff – see 3.2.2 above). However diverse, the types of income can be broadly categorised and are considered below.

3.2.5.1. Cash fees and bonuses for services / performance rendered

It does not matter whether the sportsperson is an independent contractor or an employee. The term "services rendered" spans both of these categories.

As discussed in 3.2.4.2 above, the dominant originating cause of the income is usually the service rendered. As such the place of performance of those services must be identified. In the case of a multitude of locations (especially across borders), the income from the services rendered would have to be apportioned between the locations of the single originating cause. This would certainly be true for sportspersons (including team doctors etc.) paid by a club, province, or national association on a regular basis i.e. irrespective of the number of times actual service was required – payment is for the service to be available in those locations. In such cases, the regular (say, monthly) income would have to be apportioned where the sportsperson has been available to perform in multiple locations. To the extent that the sportsperson has performed in South Africa, the amount may be subject to South African tax.

Where contracts are concluded for individual performances at a particular location, there is little difficulty in identifying the source. For example, based on the player's renown in the sport, the player is invited to a tournament and paid a fee for that specific appearance. While the development of the player's renown worldwide is certainly a *sine qua non* of the invitation and contract, the actual appearance of the player at the tournament is the *causa causans* of the income. The source would be where the tournament takes place. Similarly where the contract specifies particular payments for performances at particular locations, it may be easier to identify the quantum of the amount sourced at that location. Care should be exercised here

that the payment amounts for particular locations are not thinly disguised transactions seeking to avoid taxation in the country of source.

To the extent that these amounts are from a South African source the necessity of an originating cause linked to the service rendered would be sufficient to include these income streams in the scope of the withholding tax provisions.

3.2.5.2. Non-cash benefits

For normal tax purposes and in the context of employment,[100] benefits awarded to the employee by the employer fall to be taxed as a "fringe benefit". These non-cash benefits are taxed in terms of paragraph (i) of the gross income definition. The Seventh Schedule to the ITA determines the valuation of the cash equivalent of the non-cash benefit, to be included under paragraph (i), for income tax purposes.

Benefits awarded that do not fall within the Seventh Schedule or awarded to independent sportspersons (i.e. not employees) remain "amounts" received or accrued to the sportsperson. These amounts must be valued "in money's worth" before tax can be levied. Should such benefits be considered to be of a South African source and have a sufficient causal link to the sporting activity in South Africa, the withholding tax provisions will apply. Where the causal link is absent, but the South African source rules are still found to be applicable, normal tax applies.

3.2.5.3. Non-contractual bonuses and other benefits

Bonuses paid to sportspersons for exceptional performance in a tournament or competition may qualify for exclusion from the withholding tax and gross income. As detailed earlier in the chapter, for the amount to qualify as an amount received or accrued "in respect of" the specified activity, a causal link must be present. Where the causal link is not immediate enough or ancillary to the performance, it cannot be said to be "in respect of" the specified activity. In these circumstances the amount would not qualify for withholding tax. Similarly,

[100] "Employment" must be distinguished from "employee". Fringe benefits are linked to employment. The independent sportsperson receiving non-cash benefits may be an "employee" for the purposes of the Fourth Schedule in terms of the statutory tests, but is not employed as contemplated for the purposes of "employment" in terms of the common law tests for independent contractors / traders. Employment is considered in the narrow sense of a master and servant relationship (see *SIR v Somers Vine* (1968) 29 SATC 179). See also discussion in 3.3.2. of this Chapter.

if escaping withholding tax and the amount is related more to "a testimonial or accolade rather than the quality of remuneration for services rendered"[101] by the sportsperson, the amount would have to have an immediate causal link to the service rendered by the sportsperson to qualify for the "services rendered" inclusion in gross income. It is submitted that only in exceptional circumstances can it be said that such an amount does not have an immediate causal link to the sportsperson's activity.

Non-contractual bonuses or other benefits not carrying the features of a testimonial or accolade would generally be found to be in respect of the services rendered and as such subject to the withholding tax.

3.2.5.4. Training fee income

As with amounts received for general sporting services, there would need to be an immediate causal link between the amount paid for training or practice and the sporting performance in South Africa before the amount could attract South African tax.

Where the training is undertaken in South Africa without the sporting performance in South Africa, the source would be dependent on the circumstances. For example, the sportsperson is paid per public performance i.e. no amounts are received between sporting performances versus the sportsperson who is paid a regular income (salary) over a period irrespective of the number of performances. These two examples have different outcomes. In the first example, the sportsperson receives income only from actual performance. It is submitted that the clear *causa causans* is the public performance. The location of that performance is the source, the training being relegated to a *causa sine qua non*. In the second example, the performance is not the cause of the income. Being available to perform and thereby maintaining fitness by training is the clear link to the income. The location of the actual performance is merely ancillary to the earnings. The constant "service" of training and performing is the *causa causans* and therefore apportionment may be appropriate where the sportsperson performs this service across national borders.

[101] See *Stander v CIR* (1997) 59 SATC 212 at 220. Amounts that are merely an accolade and not rewarding the performance may be found to be of a capital nature and therefore not gross income (if not subject to the services rendered paragraph of gross income).

3.2.5.5. Prizes and medals

Prizes and awards made to employees may be taxed in their hands as income where there is a sufficient causal link to the service rendered and the prize or award.[102] Despite the voluntary nature of the award and the fortuitous nature, indicative of capital, the "services rendered" paragraph of the gross income definition will override such nature.[103]

For the purposes of the withholding tax, while a causal link is still required, it is required in the context of the definition of "specified activity". This definition refers to the personal activity exercised by the sportsperson. Consider, for example, the ultra-marathon runner (non-resident) taking part in the Comrades Marathon event. If such runner achieves a top 10 placing, the runner receives a solid gold medal. Clearly the medal was received as a direct result of the personal activity performed in South Africa. It does not matter that the runner may or may not have achieved that position due to fortuitous events on the day e.g. a "running a personal best". The medal is linked to the personal activity. It has determinable value (determinable against the gold price) and is an amount received by the runner for the specified activity performed.

3.2.5.6. Royalties or income from a sportsperson's image rights

A royalty must be distinguished from an amount payable for use of a sportsperson's image.[104] Royalty or similar payments are subject to a separate withholding tax.[105] Only amounts that do not qualify as true royalties for the purposes of the South African ITA would have to be contemplated for normal tax and withholding tax on sportspersons.

For the purposes of the royalty withholding tax provision, the scope includes amounts received or accrued by virtue of:

> "(a) the use or right of use in the Republic of, or the grant of permission to use in the Republic—

[102] *Stander v CIR* (1997) 59 SATC 212 and *ITC 117* (1928) 4 SATC 70. It is submitted that this case remains relevant despite the decision in *CSARS v Brummeria Renaissance (Pty) Ltd and Others* 69 SATC 205 (2007) in which Cloete JA stated that the contrary view stated in *Stander's* case was "wrong". This statement was in the context of the use of the term "amount" and not in the context of the causal link to the services rendered.

[103] See also *ITC 976* (1961) 24 SATC 812; *ITC 701* (1950) 17 SATC 108 and *ITC 117* (1928) 4 SATC 70

[104] *ITC 1735* (2002) 64 SATC 455

[105] Section 35 of the ITA imposes a flat rate of 12% on gross royalty payments made to non-residents for use of the underlying intangible or knowledge in South Africa

(i) any patent as defined in the Patents Act, 1978 (Act No. 57 of 1978), or any design as defined in the Designs Act, 1993 (Act No. 195 of 1993), or any trade mark as defined in the Trade Marks Act, 1993 (Act No. 194 of 1993), or any copyright as defined in the Copyright Act, 1978 (Act No. 98 of 1978), or any model, pattern, plan, formula or process or any other property or right of a similar nature; or

(ii) any motion picture film, or any film or video tape or disc for use in connection with television, or any sound recording or advertising matter used or intended to be used in connection with such motion picture film, film or video tape or disc,

wheresoever such patent, design, trade mark, copyright, model, pattern, plan, formula, process, property, right, motion picture film, film, video tape or disc, sound recording or advertising matter has been produced or made or such right of use or permission has been granted or payment for such use, right of use or grant of permission has been made or is to be made, and whether such payment has been made or is to be made by a person resident in or outside the Republic; or

(b) the imparting of or the undertaking to impart any scientific, technical, industrial or commercial knowledge or information for use in the Republic, or the rendering of or the undertaking to render, any assistance or service in connection with the application or utilisation of such knowledge or information, wheresoever such knowledge or information has been obtained or such knowledge or information has been imparted or is to be imparted or such assistance or service has been rendered or is to be rendered or any such undertaking has been given, and whether payment for such knowledge, information, assistance, service or undertaking has been made or is to be made by a person resident in or outside of the Republic".[106]

In *ITC 1735* the taxpayer, a non-resident golfer, for a fee permitted the tournament organisers in South Africa to make use of his name, biographical details and conduct interviews. The golfer also had to appear at a reasonable number of pre-, during and post tournament events. It was argued on behalf of this taxpayer (and stipulated in the contract) that the amount was a royalty, being a payment for use similar to that of a patent etc. per section 35(1) of the ITA. In his judgment, Goldblatt J stated: "In our view the submission made on behalf of the appellant is untenable. The appellant was paid the monies to allow his name, biographical details and interviews with him to be used in promoting the tournament. Patents, designs, trademarks and copyright are all rights designed to protect the creators or their assigns of original intellectual works. The appellant's name, likeness, biographical details etc are not creative effort by the appellant and are accordingly of an entirely different nature to the rights listed in [section 35(1)]".

[106] Section 35(1) of the ITA

Olivier *et al* (2008) refer to the Supreme Court of Appeal case *CSARS v SA Silicone Products (Pty) Ltd*.[107] They summarise from the judgment as follows:

> "The majority of the Court held that to be property which is similar in nature, it should possess fundamental characteristics common to those possessed by the specifically identified properties; minor or superficial similarities will not of themselves suffice. The common nature of the identified properties is that:
>
> - they all derive from a creative mind;
> - they all have the potential for common exploitation;
> - the fact that the law regards such exploitation as creating a justifiable monopoly which is available only to the creator of the property or persons to whom the creator transfers his rights according to law; and
> - the law accords the rights and protection of ownership to such property".[108]

It is clear from the above two cases that "royalty" is a narrow concept and while other incomes may be termed "royalty" the income will not be taxed as such. It is submitted that in situations such as *ITC 1735* the income failing to be classified as royalty income would fall to be taxed in terms of the withholding tax provisions. In that case, the payment was for a limited period use of biographical details etc. The use was clearly of a South African source and the location of the originating cause did not cross national borders leaving the entire amount to be taxed in South Africa. As a clear causal link existed between the golfer's appearance and performance in South Africa, the use of his biographical details during the tournament would (if it had accrued or been received on or after 1 August 2006) result in the amount paid for such use being taxed in terms of the withholding tax provisions.

It is submitted that where the royalty withholding tax is applicable, then as a specific provision applying to a specific income, it would apply in preference to the provisions of the withholding tax applicable to sportspersons. As the amount would have been subjected to tax, there is a natural presumption that the same amount of income cannot be subjected to income tax twice unless there is clear evidence that the Legislature intended that result.[109] It is submitted that it was never the intention of the Legislature to subject a royalty payment made to a non-resident sportsperson to both the withholding tax on royalties and the withholding tax on sportspersons. The result, if allowed, would be clearly objectionable as an aggregate of 27% tax would have been applied to the gross receipts of the sportsperson with no relief in the form of deductions.

[107] (2004) 66 SATC 131

[108] Olivier *et al* (2008: 340).

[109] See *Isaacs v CIR* (1949) 16 SATC 258 at 266 and *CIR v Delfos* (1933) 6 SATC 92 at 112

It seems consistent with the international view expressed in the OECD Commentary that income of a true royalty nature should not be considered as relating to the sportsperson's particular performance activities considering such income rather in terms of the Royalty Article of the DTA than the Sportsperson Article.[110]

3.2.5.7. Cancellations and inducement payments

Amounts paid to a sportsperson as an inducement to perform in South Africa would generally be considered to be taxable in South Africa. For normal tax purposes, amounts received for services to be rendered remain within the gross income definition.[111] Similarly for withholding tax purposes, the imposition provision (section 47B) refers to the specified activity being exercised or *to be exercised* in the Republic. This second category of activities to be exercised would result in the inclusion of inducement payments within the ambit of the withholding tax.

Cancellation payments are made for the performance or service to no longer be rendered or exercised in South Africa. In general the payment is to replace the income lost as a result of the cancellation of the sporting performance. While clearly of a revenue nature in this case, it is less clear as to the source of the income. The source would be determined in terms of the specific facts and circumstances. For example, the organising sporting body contracts to pay the sportsperson a cancellation fee if the body, in its sole discretion, decides to cancel the event. It is submitted that in this situation the location of the decision-making body of the organisation demonstrates the source of the cancellation fee. If the cancellation fee was payable if the sporting performance was no longer to take place as a result of certain contractual conditions not being met, it is submitted that the contractual term not fulfilled is the cause of the cancellation fee and the location of that cause (be it the action or inaction of the other contractual party) would be the source of the fee.

In either situation, it is submitted that the cancellation fee would not be subject to the withholding tax on sportspersons as the fee is not payable in respect of the specified activity being rendered or to be rendered in South Africa.[112]

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[110] Paragraph 9 of the commentary to the 2008 OECD Model states: "Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17".

[111] See *CIR v Cowley* (1960) 23 SATC 276 for support

[112] See, for example, *ITC 560* (1944) 13 SATC 308 in which a contract for the sale of goods in South Africa was cancelled and instead the goods were sold in India. The resulting profit was not of a South African source as the

3.2.5.8. Sponsorships and endorsements

Sponsorships and endorsements can create a variety of different tax treatments. Each type of sponsorship or endorsement must be analysed in the context of the agreement in place. For example, a sportsperson may receive equipment or clothing at no cost, but no further monetary reward, in exchange for only wearing or using that brand of clothing or equipment. Such non-cash sponsorship does have monetary value (the value of the clothing or equipment received). Unless the clothing or equipment awarded can be linked to a specific sporting performance or series of performances, it cannot be said that the clothing or equipment is linked to the personal exertions and performance of the sportsperson. As the clothing and equipment may be only ancillary to the sporting performance,[113] it is submitted that an insufficient causal link between the sponsorship and the sporting performance exists for it to be said that the sponsorship is in respect of the specified activity.

Sponsorship may take the form of cash reward for particular performance or regular payments to sustain the sportsperson (particularly the professional sportsperson) between performances in exchange for endorsement or support for that organisation's brand e.g. be seen to train and perform in branded clothing; recording audio or video advertisements of the product and the like. Where ancillary to the sporting performance, there may be an insufficient link to a South African source. For some sportspersons, sponsorships and endorsements can be a significant part of their income, Formula 1 drivers selling "space" on their racing suits, for example. Where such contracts are structured that the "space" is sold for a specified number or specifically identified performances, source may be readily identified and there would be a strong link to the particular sporting performance such that the resulting income would fall within the ambit of the withholding tax or failing that, normal tax.

activity did not take place in South Africa. Similarly, without the resultant activity in South Africa, it is submitted that the cancellation fee does not have a South African source.

[113] For support, see *COT v Shein* (1958) 22 SATC 12. Tredgold CJ stated: "When a man is engaged to perform a certain work in a given country but has minor duties in another country, then I do not think it is a practical approach to suggest that portion of his income has its source in that other country. When he is not paid separately for those extraneous duties, it becomes particularly artificial to try to allot portion of his earnings to them".

3.2.5.9. Reimbursed expenditure

In the context of employment, where an employer reimburses an employee for expenditure incurred on the employer's behalf, such amount is not subject to normal tax.[114] The employer would normally claim the expense (subject to any specific deduction limitations).

Where an independent sportsperson incurs expenditure and passes the effective cost on to, for example, the event organisers, such billing cannot be seen to be reimbursive expenditure.[115] That the sportsperson builds the cost of, for example, travelling to and from the event into their fee does not change the nature of a fee charged. The amount (inclusive of the amount to cover the expenses) would be subject to the withholding tax. In the context of normal tax, while the full billing would be gross income, the costs would possibly qualify as deductions (see 3.2.6 below) and therefore provide a more equitable result.

To circumvent the onerous position created by the gross receipt being taxed for withholding purposes, the independent sportspersons should negotiate that the travel costs be borne by the event organisers directly i.e. is neither a cost nor a fee charged by the sportsperson.

3.2.6. Deductions applicable to sportspersons against South African income

Whether non-resident sportspersons performing in South Africa will qualify for deductions depends firstly on whether the potential deductions relate to amounts subject to the withholding tax or normal tax. If the amount is subject to the withholding tax, it is exempt from normal tax. This exemption results in no deductions being permitted against such amounts.[116]

For those amounts that are subject to normal tax (i.e. the withholding tax does not apply), deductions may be applicable. A key distinction to be made is whether the sportsperson is an employee or not.

Persons earning remuneration in respect of employment or the holding of an office are only permitted limited deductions pertaining to their employment trade, specifically: wear and tear

[114] In terms of section 8(1) of the ITA

[115] Reimbursive expenditure usually requires the expense to be incurred in furtherance of the "employer's" business. Independent persons are furthering their own business.

[116] Section 23(f) denies any deduction against amounts exempt from normal tax for normal tax purposes. Furthermore, the withholding tax is levied against gross amounts received by or accrued to a sportsperson.

on assets used for employment; bad and doubtful debts; legal expenses; pension and retirement annuity fund contributions; loss of income insurance policy premiums (where if the policy becomes payable the amount would be taxed as income); repairs or expenses relating to a home office. Each of these expenses is further limited by the provisions of the relevant section. However, as section 23(m) refers to "employment", it is not applicable to the independent sportsperson (refer to 3.3.2 below for a discussion of the definition of "employee").

Persons who are not employees are not so limited. All expenses incurred for the purposes of their trade are permitted as deductions (subject to the limitations of the relevant deduction provisions).

3.3. WITHHOLDING TAX ON NON-RESIDENT SPORTSPERSONS

3.3.1. Introduction

The explanatory memorandum (2005: 35) to the Revenue Laws Amendment Act 31 of 2005, explains the reason for the introduction of the withholding tax on sportspersons as follows:

> "It is an internationally accepted practice that foreign entertainers and sportspersons are liable for income tax in the specific countries in which they perform. South Africa's ability to collect this tax is not as effective as it should be due to numerous practical constraints. One of the main contributors to these constraints is the short period of time for which the non-resident entertainer or sportsperson is physically present in the country. Any failure by South Africa to collect this tax is, in effect, an erosion of its tax base in favour of the countries of residence of the visiting entertainers and sportspersons. These countries are likely to impose tax on the income of the visiting entertainers and sportspersons without the need to give credit for the tax that should have been paid in South Africa".

It is clear from this extract that the main reason for the introduction of the withholding tax is administrative convenience i.e. a "practical" collection mechanism. The practicality of the system needs to be tested against the past system in place.

3.3.2. The "old" system – Normal Tax

Before the introduction of the withholding tax provisions, any sportsperson performing in South Africa would have been subject to normal tax based on income earned from a South African source. The source principles have been discussed at length in 3.2 of this Chapter and no attempt is made to discuss these principles further.

A non-resident earning South African source income would have been required to submit a return after the end of the year of assessment concerned, necessitating registration as a South African taxpayer. In that return, all the South African source income would be declared against which the non-resident taxpayer could claim relevant expenditure. This implies that the taxpayer would be taxed on a "net basis".

Non-resident taxpayers can generally be said to have earned income from two different types of activity, namely employment or independent trade. It is critical to this analysis to understand the South African concept of "employee" to analyse the distinction between the employed sportsperson and the independent sportsperson.

The first aspect of the definition of employee provides that a natural person is considered an employee if that person receives "remuneration". In turn, "remuneration" is widely defined. The opening lines of the definition provide insight into the scope in that remuneration includes: "salary; leave pay; wage; overtime; bonus; gratuity; *commission; fee; emolument;* pension; superannuation allowance; retiring allowance or stipend, *whether in cash or otherwise* and *whether or not in respect of services rendered* […]" (*emphasis added*). It is submitted that a sportsperson charging an appearance fee for a South African appearance would be receiving "remuneration" as defined and therefore would be an employee.

The definition of "remuneration" does have certain category exclusions. The exclusion relevant for this analysis is the exclusion for the "independent trade". The sportsperson in the example above may well be acting independently. The sportsperson in the above example does not intend to be an employee. The fee charged is the fee that the sportsperson would have charged worldwide (say). Would such a person still be an employee? The answer must be derived in a two-stage process. Firstly, the statutory exclusion from remuneration for independent traders does not apply where the person examined is a non-resident.[117] The statutory tests cannot be applied to a non-resident and therefore immediately fail. The second

[117] The "remuneration definition excludes: "any amount payable in respect of services rendered or to be rendered by any person (*other than a person who is not a resident* or an employee contemplated in paragraph (b), (c), (d), (e) or (f) of the definition of 'employee') in the course of any trade carried on by him independently of the person by whom such amount is paid or payable and of the person to whom such services have been or are to be rendered" (*emphasis added*). The provisos that follow are not relevant to this discussion.

stage is to consult the common law test. This is known as the "Dominant Impression Test".[118] While a variety of factors are listed in the Interpretation Note, SARS provides that this listing is not to be used as a checklist. The facts and circumstances of each case would have to be examined before a conclusion can be drawn as to the taxpayers "independent contractor / trader" status. The common law test does not, however, override the "statutory test" for independence for the purposes of employees tax i.e. if a non-resident sportsperson receives a fee they are subject to employees tax. For the purposes of the rest of the ITA (i.e. outside the scope of Schedule 4 to the ITA), the non-resident sportsperson is not an "employee". This means that the person would qualify for deductions.[119]

Where the sportsperson is an employee for the purposes of the Fourth Schedule to the ITA (employees tax), the "employer" is the person liable to pay the remuneration and therefore withhold the employees tax. The obligation on the person paying the sportsperson would be that of an employer. Within seven days of the end of the month in which the sportsperson was paid, the employees tax withheld would be payable to SARS. This "employees tax" withheld would act as a tax credit against the final normal tax liability determined at the end of the year of assessment. The employees tax, like normal tax would be generally based on progressive rate tables for natural persons. However, exceptions exist, for *ad hoc* employees for which a flat rate of 25% is applied.

For the independent sportspersons, amounts other than those of the nature referred to in the definition of remuneration would escape employees tax. Royalty payments (but not disguised service payments – see *ITC 1735*); amounts received for the sale of sporting (and other) goods may escape these implications. Endorsement payments or any other payment tainted by a services nature may fall within the scope of "remuneration" and as such fall within the ambit of employees tax. It should be noted that royalty payments to the non-resident sportspersons would be captured by the withholding tax applicable to royalties and the sale of goods may

[118] See Interpretation Note 17 – Employees' Tax: Independent Contractors (Issue 2) (9 January 2008) is available at http://www.sars.gov.za

[119] This is made clear in Interpretation Note 17 in which it is stated: "An independent contractor who is deemed not to be one for purposes of the Fourth Schedule is not, however, also deemed to be an employee. The independent status under common law of an independent contractor that is deemed not to be independent remains unaffected. This means that such an independent contractor will not be affected by section 23(m) of the Act".

indicate a permanent establishment in South Africa (which would be separately subject to income tax in South Africa and not classified as employees tax).

The imposition of a legal entity between the non-resident sportsperson and the person paying a "fee" classified as remuneration does not of itself solve the "employee" problem. Labour brokers (natural persons) and personal service providers (companies or trusts) all fall within the ambit of the definition of employee for the purposes of employees tax. Furthermore, income tax is levied at a flat rate of 33% (for years of assessment ending on or after 1 April 2008).[120] Those sportspersons using companies employing at least three full time employees (who are not connected persons of or are themselves shareholders of the company or connected to the sportsperson) would not be classified as personal service providers. However, careful planning would be required to ensure that the company used is not a South African resident; does not have a permanent establishment in South Africa or an agent responsible for paying remuneration in South Africa (in which case a "representative employer" would be present).[121]

Non-resident team sportspersons paid by overseas clubs for their performance in South Africa may well have escaped practical collection of the South African tax liability. The sportsperson in this case would have had the obligation to register as a provisional taxpayer, but is unlikely to have done so. It is doubtful in these circumstances whether a representative taxpayer would exist in South Africa. With no employees tax withheld, and it is submitted naivety of the South African tax system, tax evasion would have resulted.

It is evident from the above that only in limited circumstances would the obligation to withhold employees tax not have applied. As the withholding would have been based generally on the gross fee payable to the person, the final liability (after taking all relevant deductions into account) would have been less than the tax withheld, resulting in a refund.

In summary (and in the absence of any DTA relief), any fee (or other form of remuneration) payable to a sportsperson in South Africa should have resulted in a withholding of employees

[120] The same rate is applied to a branch of a foreign company operating in South Africa.

[121] "representative employer" means […] (d) in the case of any employer who is not resident in the Republic, any agent of such employer having authority to pay remuneration, who is a resident, but nothing in the definition shall be construed as relieving any person from any liability, responsibility or duty imposed upon him by this Schedule". Extract of the definition of "representative employer" from Schedule 4 to the ITA.

tax. The imposition of a legal entity would only have been successful if the requisite number of unconnected full time employees existed.

Other types of income not considered remuneration but still of a South Africa source would not have resulted in employees tax withholding. It is possible that other forms of activity could have resulted in the existence of a permanent establishment and as such South African tax consequences would have followed. As permanent establishments generally have assets in the country of operation, SARS would have had an avenue for the collection of outstanding taxes.

Where no permanent establishment existed and there was no employees tax obligation, South African source income would still have generated a normal tax obligation. It is this last category that would create the greatest collection difficulty. This imposition of a withholding tax regime aimed at practical efficiency should address these categories of income.

3.3.3. The "new" system – Withholding Tax

The system of withholding should, it is submitted, introduce improvements on the "old system" and the likelihood of better collections.

The withholding tax legislation was introduced with effect from 1 August 2006 and is contained in sections 47A to 47K of the ITA (see Appendix D). Each of these provisions is analysed to establish if the legislation in its current form will aid collection and efficiency.

Section 47A contains the two definitions relevant to the withholding tax. These definitions have already been discussed in 3.2.2 and 3.2.3 of this chapter. In summary, the definition of sportsperson is wide. It covers not only the athlete performing but also support staff associated with the sport, for example team doctors and the like. Similarly, the definition of "specified activity" is equally broad following from the scope of the definition of sportsperson. The provisions are aimed more clearly at services than other types of income by including only "personal" activities exercised or to be exercised in South Africa (personal connoting an activity done by that person and not that person's delegate). In the context of support staff, it must be remembered that these persons are defined as "sportspersons" in their own right. The amount earned by, for example, the team doctor for work done during the preparation for and during a match would be a personal and therefore specified activity of that doctor (sportsperson as defined).

The withholding tax is imposed where specified activities are performed by non-residents, provided the amount is received by or accrues to a non-resident (i.e. the sportsperson or entity representing the sportsperson). A flat rate of 15% is applied on the gross amounts received or accrued (i.e. no deductions against the income is permitted). Amounts received that are subject to this withholding tax are not liable for employees tax or normal tax.[122] It is submitted that it must first be determined whether the withholdings tax applies. Only in the absence of the withholding tax applying could normal tax or employees tax apply.

The withholding tax will not be imposed where the sportsperson is an employee of a resident employer, and such sportsperson is physically present in South Africa for 183 days in aggregate during a twelve month period beginning or ending in the year of assessment in which the specified activity was performed. For example, an international rugby player contracts with a South African provincial side to play rugby for a season (which will last 184 days). The player will be paid by the provincial association / corporate entity which will be a resident employer. The player will be paid "remuneration" as defined (see earlier commentary) and will therefore be an employee. If the provisional legal entity invites an international coach to assist in the team training for a period of two months, and the coach is paid by the provincial legal entity and does not spend a longer period in South Africa, that amount will be subject to the withholding tax.

To the extent that the sportsperson is not being paid by a resident employer and spending the requisite number of days in South Africa, any non-resident receiving the amount on behalf of the sportsperson will be subject to the withholding tax. This means that the withholding tax is applied at the first instance of payment to a non-resident. If the amount is payable to a resident company for the non-resident sportsperson's performance (and the physical presence of the sportsperson is less than 183 days in aggregate), it is the subsequent payment from the resident company to the non-resident sportsperson that will be subject to the withholding. The amount received by the resident company will form part of the company's gross income. Provided that the amount on-paid to the sportsperson is in the production of the company's income, such amount would be a permissible deduction for the company.

[122] The amounts subject to withholding tax are exempt from normal tax in terms of section 10(1)(lA) of the ITA. As employees tax may only be levied "in respect of the liability for normal tax" (paragraph 2 of the Fourth Schedule to the ITA), no employees tax may be levied on such amounts.

Primary liability for withholding the tax rests first with the non-resident. Any non-resident to whom an amount accrues or is received in respect of a specified activity has 30 days from the earlier date of receipt or accrual to make payment to SARS. This obligation is removed where a resident makes payment to the non-resident. The resident is then obliged to immediately withhold the tax on behalf of the non-resident sportsperson and is required to make payment to SARS in the month following the month in which the amount was so withheld. The resident's obligation to withhold and make payment to SARS is only removed if the non-resident makes payment directly. Note that the obligation is not lifted if the non-resident undertakes to make payment but does not do so. In such circumstances the amount will be recovered from the resident.

Clearly the withholding system can run efficiently where a resident makes payment to the non-resident. The Explanatory Memorandum to Act 31 of 2005 clearly indicates that this is the likely scenario, stating: "the bulk of payments to foreign entertainers and sportspersons are made by South African residents that organise the performance". However the withholding tax system has the potential to fail where a non-resident organisation is responsible for the payment to the non-resident sportsperson for performance in South Africa. For example the national association of another country send a team to play a match in South Africa. The team members, for this example, are remunerated exclusively by their national association. As no resident has made payment, the obligation to withhold tax and make payment to SARS rests on the non-resident sportsperson (not the foreign national association). Since the obligation to make payment is 30 days after the earlier of receipt or accrual, it is entirely feasible that the non-resident sportsperson will have left South Africa before payment is required. SARS will be left with no resident to draw on for the tax due.[123]

The old system had limitations as does the new.

3.3.4. Comparison and discussion

A number of issues should be considered in comparing the two systems:

(a) Does the withholding tax present a monetary advantage for the fiscus i.e. will more be earned (not necessarily collected) using a flat rate on the gross amount payable?

[123] This is not to say that the tax should not be levied. The relevance in the levying of a tax relates to the nature of the payment and not the person who must make payment (see *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL 23). Such omission to pay the tax is evasion on the part of the sportsperson.

(b) Does the withholding tax represent a viable method of collection i.e. is advantageous when compared to the "old system"?

3.3.4.1. Money earned

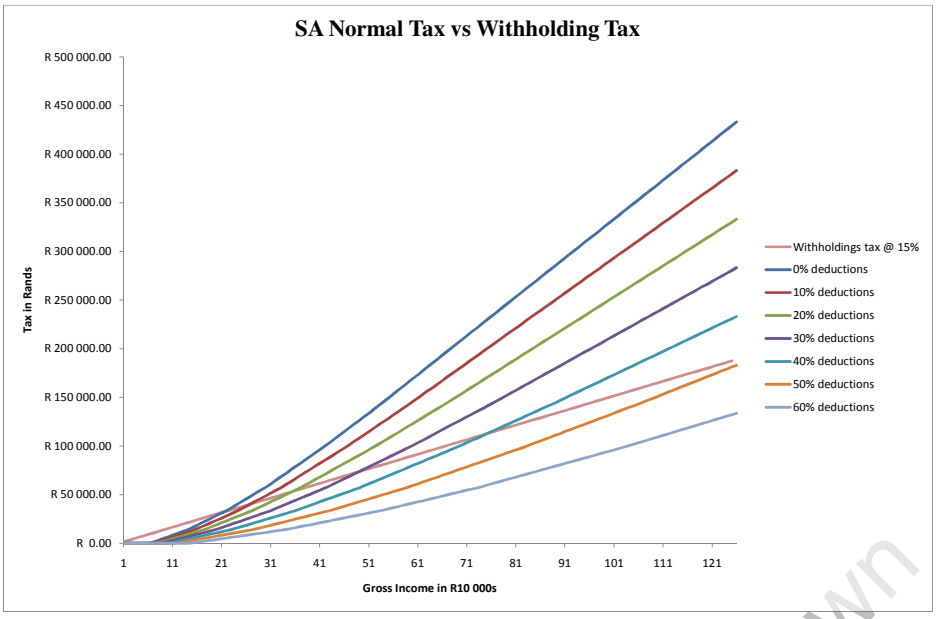
Normal tax for individuals is levied based on progressive rates. Marginal rates range between 18% and 40%. For the 2010 year of assessment, the 40% marginal rate applies to the excess taxable income above R525 000. All taxpayers (resident or not) as natural persons qualify for a primary rebate of R9 756 for the 2010 year of assessment. There is also an additional rebate for natural person taxpayers over the age of 65. For the purposes of comparison below, the secondary rebate has not been taken into account.

Employees tax, the collection mechanism for the majority of natural person taxpayers in South Africa, is levied based on the same progressive rates for natural persons. The rebates are also taken into account. If an employed natural person earns a salary and no other income for a year of assessment, the normal tax liability should match the employees tax withheld by the employer.

The withholding tax is levied at a flat rate on the gross amounts received or accrued. "In order to compensate for the inability to claim tax deductions, the rate to be imposed will be at 15%" (Explanatory Memorandum to Act 31 of 2005). This is a final tax and does not serve as a tax credit against normal tax. Normal tax and employees tax cannot be levied against the amounts subjected to this withholding.

Using the progressive tax rates and primary rebate for natural persons, over taxable income increased by increments of R10 000, the normal tax due was determined in the range of taxable income from R0 to R1 250 000. In addition, the calculation was repeated assuming allowable deductions against the taxable income from 0 to 60%.

The results of the normal tax calculations (for natural persons) at the various deduction rates and taxable income were then plotted against the withholding tax at the same taxable income levels. The results are reflected in the chart below.



Normal tax rates are higher than the flat withholding tax rate of 15% for both natural persons (where the starting rate is 18%) and companies (where the rate is generally 28% but increased to 33% for branches of non-resident companies). At deduction levels of 50%, the sportsperson would have to be remunerated at just under R1 340 000 before normal tax levied would match the withholding tax levied. However, where deductions represent 62.5% of gross earnings, normal tax will never exceed the withholding tax levied.[124]

Employees receive limited deductions. Whether the independent sportsperson would also be bound by section 23(m) is debatable (refer earlier discussion). Even so, at lower deduction levels, it is clear that normal tax generates higher revenue for the fiscus than the withholding tax. This sacrifice on the part of the fiscus must imply that the old system was inefficient from a collection perspective, necessitating the introduction of the withholding tax.

[124] Proven as follows (where x represents R1 of income; y represents R1 of deductible expenditure; 15% is the flat rate on gross earnings for withholdings tax purposes and 40% is the maximum marginal rate applicable to natural persons on the progressive tax tables):

$$\text{If}: 15\%x = 40\%(x - y)$$
$$\text{Then}: 15\%x = 40\%x - 40\%y$$
$$\text{Then}: 40\%y = 25\%x$$
$$\text{Then}: 160\%y = 100\%x$$
$$\text{Thus}: y = 62.5\%x$$

3.3.4.2. Old versus new – someone to chase?

Typical income for a sportsperson will be the fee received for the sporting performance. This generalisation is equally applicable to the support staff contemplated within the definition of "sportsperson". As recipients of a fee, these non-resident sportspersons should have been treated as employees (see earlier discussion). As such the employer (resident or resident representative) would have to have withheld the employees tax and paid the amount withheld to SARS within 7 days after month end of the month in which the withholding took place. Furthermore, despite the lack of traditional employment relations, the non-resident could not escape via the independent trader exclusion as this is only applicable to residents.

In the case of a non-resident "employer" paying a non-resident "employee" for performance in South Africa, the sportsperson may have escaped taxation if there was no need for a resident person to act on behalf of the non-resident employer (i.e. there was no representative employer). While the liability to pay normal tax existed, the sportsperson could still evade tax (albeit illegal to do so) and there was no employer or representative from whom SARS could claim the taxes due.

The new withholding tax system places the burden on the non-resident to pay the withholding tax within 30 days of the earlier of receipt or accrual. This obligation is removed where a resident is responsible for the payment. In this case, the resident is obliged to withhold the tax and pay it by the end of the month following the month in which the amount was payable to the sportsperson. Where a non-resident was responsible for making payment to the non-resident sportsperson, the withholding responsibility rests on the sportsperson.

From this analysis there appears to be a greater relaxation of control rather than the efficiency expected through the introduction of a new tax. Firstly, there is no greater pool of resident persons to chase. Where residents were involved under the old system, employees tax was applicable. Residents responsible for making payment to sportspersons are also required to withhold the tax. Under both systems if the resident failed to make a withholding, such resident remained responsible for payment. Secondly, where non-resident "employers" are concerned, under the old system there was the opportunity to look for a representative employer in South Africa. Failing that, the normal tax responsibility rested with the sportsperson. Under the new system, if no resident is responsible for the withholding, the sportsperson is responsible for paying the withholding tax. The legal burden is unchanged for the sportsperson. All that has changed is the time frame for the payment. Under the

withholding tax, payment is to be made within 30 days of the earlier of receipt or accrual. Under the old system and assuming no employees tax, the sportsperson would have to register as a taxpayer and submit an annual return declaring the income. This longer process is perhaps the only inefficiency when comparing the old system to the new.

3.3.4.3. Knowing whom to chase!

The Explanatory Memorandum to Act 31 of 2005 provides: "In order to address the compliance constraints of this system, a reporting requirement is proposed to ensure that the South African Revenue Services is made aware of the performance and will be able to follow up in cases where an entertainer or sportsperson who has left the country after a short stay does not settle the tax within the stipulated period".

Section 47K of the ITA places the burden of notification on residents.

> "Any resident who is primarily responsible for founding, organising, or facilitating a specified activity in the Republic and who will be rewarded directly or indirectly for that function of founding, organising or facilitating must, in the manner and form prescribed by the Commissioner—
>
> (a) notify the Commissioner of that specified activity within 14 days after the agreement relating to that founding, organising or facilitating of that specified activity has been concluded; and
>
> (b) provide to the Commissioner such other details relating thereto as may be required by the Commissioner".

This responsibility for notifying the CSARS adds another weapon to its arsenal. Sportspersons may not be aware that the resident organiser (even if not responsible for payment of the sportspersons) has had to notify the CSARS of the event they are required to organise. Despite the short stay, collections may be more efficient due to the ability to follow up on payment of the withholding (perhaps even before the sportsperson leaves South Africa).

If the sportsperson leaves without settling the tax, it is submitted that little can be done in terms of collection. It is a well established principle that "courts will not collect the taxes of foreign states for the benefit of the sovereigns of those foreign states".[125] However, in recent years an additional Article has been added to DTAs to assist cross border collection of taxes.[126] In addition, the South African ITA provides support for such "collection of taxes" articles in the South African DTAs (refer 3.3.5 below).

[125] *Government of India v Taylor* (1955) 1 All ER 292

[126] OECD Article 27. See Chapter 6.

3.3.5. Rules of collection in terms of South African income tax legislation

Section 47F requires the non-resident sportsperson to submit the required form together with payment. This implies that the return is due within 30 days (or a further period if the CSARS approves) as this is the due date of the payment of the withholding tax. This obligation on the non-resident sportsperson is removed if a resident payer exists and the non-resident sportsperson has not already made payment. In such cases, the resident payer must submit the appropriate form and payment by the end of the month following the month in which the tax was withheld.

If amounts payable to a non-resident sportsperson do not fall within the ambit of the withholding tax provisions, a number of different payments may result. Firstly if the sportsperson is considered to have earned remuneration (as defined in the Fourth Schedule to the ITA), employees tax would be withheld and paid to SARS within seven days from the end of the month in which the remuneration was paid. This tax withheld will act as a tax credit against the normal tax liability (see below). Secondly, if the non-resident sportsperson earns amounts not considered remuneration or other amounts in addition to remuneration earned, such sportsperson will have to register as a provisional taxpayer within 30 days of receipt of such amounts (the onus of registration being on the taxpayer). Compulsory provisional tax payments are made based on estimates. Persons other than companies make such payments on 31 August of the tax year and the last day of the tax year (being the end of February). For companies, the first payment is due at the end of the sixth month of the financial year and the second is due on the last day of the financial year. Provisional tax payments also act as tax credits for normal tax purposes.

Finally, the non-resident sportsperson earning amounts that have not been subjected to the withholding tax will have to submit the annual return for taxpayers. On assessment, the amount due (if the tax owing is greater than the tax credits from above) must be paid by the second date on the assessment; alternatively the refund owing to the taxpayer will be paid by SARS.[127]

[127] There is a practical difficulty for a non-resident taxpayer to whom a refund is due. SARS will only make refund payments to South African bank accounts. It is not possible, due to Exchange Control policies, for a non-resident to open a normal South African bank account.

The withholding tax is also supported by recourse to the resident payer where the resident failed to withhold the tax. Where there is no resident payer or the amounts fall to be taxed in terms of normal tax, recourse for collection where the non-resident sportsperson has left South Africa could only be in terms of a DTA. In the absence of a collection DTA article, evasion would be the result.

The South African ITA has a provision to assist DTA States with the collection of taxes such States have levied. Section 93[128] provides:

"Collection of taxes under arrangements made under section 108

(1) If the Commissioner has, in accordance with any arrangements made with the government of any other country by an agreement entered into in accordance with section 108, received a request, in such form as the Commissioner may prescribe, for the collection from any person of an amount alleged to be due by him or her under the tax laws of such other country, the Commissioner may, by notice in writing, call upon such person to state, within a period specified in the notice, whether or not he or she admits liability for such amount or for any lesser amount.

(2) If such person—

(a) admits liability;

(b) fails to respond to the notice; or

(c) denies liability but the Commissioner, after consultation with the competent authority of such other country, is satisfied that—

(i) the liability for such amount is not disputed in terms of the laws of such other country; or

(ii) although the liability for such amount is disputed in terms of the laws of such other country—

(aa) such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; or

(bb) there is a risk of dissipation or concealment of assets by such person, the Commissioner may, by notice in writing, require such person to pay the amount for which he or she has admitted liability or the amount specified, as the case may be, on a date specified, for transmission to the competent authority in such other country.

(3) If such person fails to comply with the notice under subsection (2) the amount in question may be recovered, for transmission to such competent authority, as if it were a tax payable by such person under this Act.

(4) No steps taken in assistance in collection by any other country under any arrangements referred to in subsection (1), for the collection of an amount alleged to be due by any person under the tax laws of the Republic, and no judgment given against any such person in pursuance of such arrangements in such other country for any such amount, shall affect his or her right to have his or her liability for any such amount determined in the Republic in accordance with the provisions of the relevant law".

[128] The original principal Act as introduced was examined – refer *Statutes of the Republic of South Africa.* 1962. Government Printer, p871. The ITA in South Africa has contained this provision since introduction.

This section aligns the existing domestic fiscal legislation with the new collection Article in the newly negotiated DTAs and provides SARS with strengthened legislative authority to collect the foreign taxes levied. Certainly evasion of foreign taxes using South Africa as a base will be reduced through the use of this provision. If South Africa has such domestic force to the collection of foreign taxes, it is likely that other countries have the same. It is submitted that protocols are likely to be negotiated to include this collection article into existing DTAs (see for example the protocol entered into with Australia in 2008).

3.3.6. Effective or improved collection?

In introducing this new withholding tax in the context of sportspersons, the fiscus has clearly sacrificed the amount to be levied in exchange for the potential for efficient collection from non-resident sportspersons. Whether this collection potential will achieve the required levels to match or exceed the tax that would have been levied in terms of the old system remains to be seen. Furthermore, incomes falling outside the ambit of "specified activity" that yet have a South African source remain under the old system. There is no increased efficiency with regard to income of that nature.

Section 93 (see 3.3.5 above) will assist foreign countries to collect taxes where the taxpayer evading such foreign tax is in South Africa. It is submitted that where the collection DTA article has been entered into with other countries, the sacrifice for more efficient collection should perhaps not be as great. It is doubtful that the collection article will be the death of withholding taxes as it is certainly more efficient to collect taxes before the taxpayer leaves the country that to chase the tax through official diplomatic channels using the DTAs.

3.4. CONCLUSIONS

The term sportspersons covers not only the athlete but also sports of an entertainment character. In addition, the term can include support staff involved in the sport, such as team doctors, physiotherapists and the rest. Despite the wide scope of the definition of sportsperson the activity generating the income must have been exercised personally in the Republic by that person before that income is subject to the withholding tax on sportsperson (only applicable to the "specified activity").

Income derived by non-resident sportspersons in South Africa must have a causal link to the specified activity to qualify for the withholding tax. The necessity for a direct causal link has the result that only certain of the sportspersons' incomes fall within the scope of the

withholding tax. For other income streams, the general source rules apply, not all of which require such a direct causal link. The withholding tax is clearly a mere subset of the source rules ordinarily applied for normal tax purposes in South Africa. Normal tax, while not applicable to amounts subjected to withholding tax, is applicable to all other amounts earned by sportspersons from a South African source. In this case, a causal link is not necessarily required for all types of income earned.

Both cash and non-cash rewards from the sporting activities are included within the scope of the legislation, including medals of monetary value won. Deductions will only be permitted against items contemplated for normal tax purposes whereas the withholding tax is levied against the gross amounts received by the sportsperson.

While it is clear from the analysis in 3.3.4 that normal tax will generally yield higher tax that the withholding tax, it is apparent that the swifter collection may be advantageous to the fiscus. It is also clear that the withholding tax, while generating potential for swifter collection, applies to a sub-set of incomes considered of a South African source. Whether this system of collection is more efficient than the previous employees tax regime that would have considered the bulk of non-resident sportspersons in South Africa remains to be seen.

With the introduction in recent DTAs of the assistance in collection article, the need for a better system of collection (via withholding taxes) may be reduced. Requiring the revenue collection arm of another State to collect South African taxes may be possible in terms of this collection article, but it is submitted that this may be a slower process. It is likely to remain more advantageous for the State to collect the tax as early as possible.

CHAPTER 4

THE "TAXES COVERED" ARTICLE IN SOUTH AFRICAN DTAS AND THE SOUTH AFRICAN WITHHOLDING TAX ON SPORTSPERSONS

4.1. INTRODUCTION

Chapter 2 discussed the South African process of concluding and entering DTAs into force. It further considered the status of DTAs in the context of the ITA and the interpretation thereof in the South African legal environment.

In summary, DTAs are negotiated contracts between States. In most cases, the process begins with an extensive negotiation between representatives from the two States. Once negotiations are concluded, the DTAs are sent to the appropriate government representative to sign on behalf of the State that they represent. Finally, the DTA must be approved (ratified) by the State's parliament or equivalent body.[129] The process is lengthy. Changes to DTAs are not made easily. There would have to be motivation for both parties to re-enter negotiations.

Taxes in existence and which the relevant Contracting State have included in the scope of the DTA are generally listed in Article 2 of the DTA. The OECD Model also proposes that Contracting States include a paragraph in Article 2 to permit the consideration of future taxes imposed by a Contracting State to fall within the scope of the existing DTA. Without the reference to future taxes, it is submitted that the DTA can only include within its scope those taxes in existence at the time the DTA was concluded. An analysis of the South Africa DTAs in force at 1 June 2008[130] was conducted to test whether the introduction of the South African withholding tax on sportspersons is within the DTAs scope. The results of the analysis and proposals that result are discussed in this chapter.

[129] Further detail on the process in South Africa is contained in Chapter 2.

[130] Appendix C contains the list of treaties in force at 1 June 2008.

4.2. TAXES WITHIN THE SCOPE OF EXISTING DTAS

4.2.1. The Model Treaties

Article 2 of the 2008 OECD Model and 2001 UN Model are identical. The 2008 OECD Model article provides the following:

1. This Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.
2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
3. The existing taxes to which the Convention shall apply are in particular:
   a) (in State A): .....
   b) (in State B): .....
4. The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.

Paragraph 1 of Article 2 (the "general scope paragraph") has the purpose of widening the scope of the treaty while remaining aligned with the domestic laws of the Contracting States.[131] The Article in totality aims to remove the need for Contracting States to conclude a new DTA every time tax legislation is amended.[132] It is submitted that this purpose is only achieved through the interaction of the paragraphs. Where deviations from the OECD or UN Models occur,[133] the scope of the specific DTA may be altered.

The general scope paragraph also renders irrelevant the method adopted for the levying of the tax.[134] Having a broad scope and ignoring the method of levying the tax is necessary for the DTAs to remain effective for the avoidance of double taxation. For example, one State may levy tax using a withholding system, whereas the other State may only levy the tax on final assessment. In the absence of the general scope paragraph, the different methods adopted may render the DTA not applicable to the tax levied.

[131] 2008 OECD Commentary on Article 2 – paragraph 1 and Vogel (1997: 141).

[132] 2008 OECD Commentary on Article 2 – paragraph 1

[133] It is submitted that both deviations in wording or omissions of paragraphs may have an impact.

[134] 2008 OECD Commentary on Article 2 – paragraph 2

Paragraph 2 (the "definition of taxes paragraph") defines the concepts of "taxes on income" by loosely referring to total taxes on income or elements of income. Vogel (1997: 147) states "there is at [the] international level a basic common understanding of what 'income' mean[s]". He adds that the "positive definitions of the term 'income' in national income tax legislation usually are much narrower than this widest of all definitions of the term". This is certainly true of South African income tax legislation.[135] Employees tax deducted on behalf of an employee by an employer also falls within the scope of "taxes on income".

The 2008 OECD Commentary provides that paragraph 3 (the "existing taxes paragraph") is in principle "a complete list of taxes imposed in each State at the time of signature and covered by the Convention". It is submitted that while the commentary is clear that the list is not meant to be exhaustive, taxes in existence at the time of signing that are not included on the list are taxes that the relevant Contracting State sought to omit from the scope of the DTA (see also Lang, 2005: 220). This is particularly relevant where States follow the alternative option provided in the OECD Commentary of omitting the general scope and definition of taxes paragraphs in favour of exhaustively listing the taxes to which the DTA will apply, while retaining the equivalent of paragraph 4 (the "future amendments paragraph") to allow the convention to still apply to subsequent similar taxes. In this scenario and in the absence of the future amendments paragraph, it is submitted that the DTA can only apply to the taxes exhaustively listed.

The future amendments paragraph is of critical application to DTA networks. This paragraph achieves the aim of the general scope paragraph to prevent States having to renegotiate treaties after the introduction of a new tax. However the future amendments paragraph is limited to "identical or substantially similar taxes" introduced by a State.

Vogel (1997: 156-158) provides clarity on the meaning of "identical or substantially similar taxes". The future amendments paragraph is clearly of greater importance in the absence of the general scope and definition of taxes paragraphs. Where the general scope and definition of taxes paragraphs are included in the specific DTA, taxes introduced would usually fall within the scope of taxes on income being taxes on total income or elements of income. It is submitted that where the general scope and definition of taxes paragraphs are present in the

[135] "Income" is defined in the South Africa ITA as meaning "the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under Part I of Chapter II".

DTA, the new tax need not even be identical to or substantially similar to any existing tax to fall within the scope of the DTA.[136]

The essential elements in deciding whether a new tax is identical or substantially similar to the previous tax have been identified by Vogel (1997:157-158) as follows:

1. The name and rate of tax has no bearing on the decision[137]
2. The new tax should be reviewed with reference to all taxes historically developed by that State; by States with related tax systems; and, with reference to the other Contracting States taxes listed in the equivalent of paragraph 3[138]
3. The tax should not have been deprived of its essential features, especially in the case of a tax that replaces another

In his analysis of Article 2, Lang (2005: 221) states: "Art[icle] 2(4) of the OECD Model seems to refer to the taxes listed in the provision equivalent to Art[icle] 2(3) and not to include the general definition in Art[icle] 2(2) as a benchmark. This does not mean, however that a newly introduced tax may fall under the treaty only if a similar tax was already levied at the time the bilateral treaty was signed. On the contrary, the equivalent to *Art[icles] 2(1) and (2) applies in addition*. The scope of Art[icles] 2(1) and (2) is not limited to the taxes levied at the time the treaty was signed. Thus new taxes *covered by the general definitions* may fall within the scope of the treaty even if they are not similar to the taxes listed in the equivalent to Art[icle] 2(3)" (*emphasis added*).

Extending this commentary to treaties excluding the general scope and definition of taxes paragraphs, a tax newly introduced by a Contracting State must be similar to a tax listed in the existing taxes paragraph by either Contracting States. It is unclear whether Lang supports Vogel's view that for the tax to be similar to the existing taxes listed in the existing taxes

[136] Lang (2005: 221) concurs stating that "new taxes covered by the general definitions may fall within the scope of the treaty even if they are not similar to the taxes listed in the equivalent to Art. 2(3)".

[137] Lang (2005: 222) submits that one must look to the underlying substance and compare the different types of tax liability contained in the two taxes to prevent States substantially altering a tax but retaining its scope within the treaty by not changing the name.

[138] Lang (2005: 221) concurs with Vogel, stating that "even a tax levied only in the other contracting state may serve as a benchmark. This is justified in the light of the object and purpose of the treaty since one may assume that the similarity of a tax to a tax levied in the other contracting state would have been sufficient for the treaty negotiators to include the tax within the scope of the treaty if the tax had existed at that time".

paragraph it must be analysed in the context of all taxes historically developed by the State seeking to introduce a new tax.

4.2.2. Analysis of the scope of the South African DTA network

The discussion above provides an important starting point in the analysis of whether the new South African withholding tax on sportspersons falls within the scope of all the South African DTAs. It is submitted that where wording similar to the general scope and definition of taxes paragraphs of the OECD Model are included in the treaty, the conclusion is clear – the specific DTA includes the withholding tax on sportspersons irrespective of whether this tax is considered to be identical or substantially similar to any taxes listed in the specific DTA. Neither South Africa, nor the other Contracting State are required to have a withholding tax type listed in the existing taxes paragraph where such general scope and definition of taxes paragraphs are present.

In cases where the general scope and definition of taxes paragraphs (or wording similar to those paragraphs) are absent, the withholding tax needs to be analysed against taxes historically developed by South Africa and, within the relevant treaty, against taxes of the other Contracting State. Where such similar taxes are found, it is submitted that the new withholding tax on sportspersons falls within the scope of the specific treaty. The tax is required to be "substantially similar". This means that the tax constituent elements of the historical tax or the tax in the other Contracting State (listed in the DTA) should be similar.

Where the specific treaty does not contain paragraphs similar to the general scope; definition of taxes and future amendments paragraphs of the OECD Model, it is submitted that the new withholding tax will not form part of the specific treaty.

The analysis of the South African DTA network tested for the following:

1. Does the specific treaty contain paragraphs similar to the general scope and definition of taxes paragraphs of Article 2 of the OECD Model?
2. If not, does the treaty contain the equivalent of future amendments paragraph of the OECD Model?
3. If so, does the treaty list any withholding taxes (whether current or historical) in the existing taxes paragraph?
4. If the treaty does list a withholding tax, are the essential features similar to the withholding tax on sportspersons?

At 1 June 2008, South Africa had 64 DTAs in force. A number of treaties were also under negotiation in anticipation of the new withholding tax on dividends set to replace the South African Secondary Tax on Companies. Text of three treaties not in force[139] were also examined for new trends, however all negotiations for these three treaties were concluded before the withholding tax on sportspersons was effective.

Of the 64 treaties in force, 43 treaties had the equivalent of paragraphs 1 and 2 of Article 2. While some of these treaties were limited to taxes on income only, such limitation is of no impact for the withholding tax on sportspersons as this withholding is a tax on income. The term "income" is used in its wider sense for this purpose and includes capital gains, which in South Africa is also a tax on income and forms part of normal tax.[140] Of the three treaties concluded but not yet in force, two[141] had the general scope and definition of taxes paragraphs.

The 21 remaining treaties[142] in force all had a future amendments paragraph. Some of the DTAs referred only to taxes to be subsequently introduced that were "substantially similar" and did not refer to taxes that were "identical" to the existing taxes. It is submitted that the omission of the term "identical" has no impact in establishing whether the withholding tax on sportspersons falls within the scope of these DTAs. One treaty[143] concluded but not yet in force, while omitting the general scope and definition of taxes paragraphs, did include the future amendments paragraph.

4.2.2.1. Current and proposed withholding taxes in South Africa

The South African ITA currently contains a number of withholding taxes. Firstly, section 35 of the ITA imposes a final tax of 12% on royalty payments made to non-residents for use or right of use of patents and similar property as well as for the imparting or undertaking to

[139] These are new treaties with Mozambique and Rwanda as well as a renegotiated treaty with the Netherlands

[140] Normal tax is the tax raised in terms of sections 5 to 37H (Part 1 of Chapter II) of the South African ITA 58 of 1962

[141] Treaties with the Netherlands and Rwanda.

[142] These 21 treaties also include the treaty with the People's Republic of China which includes the equivalent of OECD Model Article 2(1) but not 2(2).

[143] The treaty concluded with Mozambique that is not yet in force.

impart knowledge of a scientific, technical, industrial or commercial nature. This withholding is based on the gross amount received by or accrued to a non-resident.

The second withholding tax[144] currently in use applies to payments made to non-resident sellers of South African immovable property. While the withholding is based on the gross amount payable to such seller, it is not a final withholding, but rather a withholding in anticipation of the final normal tax liability to be determined. This withholding tax only became effective on 1 September 2007. It is purely administrative as the true tax to be levied is South African normal tax. For this reason, it is submitted that this withholding does not have to fall within the taxes covered by any of the South African DTAs as normal tax already forms part of all 64 treaties in force.

Thirdly, there is the withholding tax on foreign entertainers and sportspersons.[145] This is a final withholding on the gross amounts received by or accrued to a non-resident entertainer or sportsperson. Whether this tax will fall to be included in the DTAs is examined in 4.2.2.2 of this Chapter.

A fourth withholding tax is proposed. Secondary tax on Companies, currently in the ITA is levied against dividends declared by resident companies. This is to be repealed and replaced with a withholding tax on dividends. National Treasury (falling within the Government Department of Finance) has stated in media releases that a number of treaties have to be renegotiated as the withholding rate in the treaties was 0%. It is submitted that this withholding tax will fall within the ambit of the existing DTAs as South Africa has previously had a form of withholding tax on dividends.[146]

4.2.2.2. Withholding tax on sportspersons and the future amendments paragraph

For the 21 treaties in force that do not include the general scope and definition of taxes paragraphs, it is necessary to establish whether the withholding tax on sportspersons is "substantially similar" to the taxes contained in the existing taxes paragraph within those specific DTAs. Alternatively, it must be established whether the withholding tax on sportspersons is substantially similar to a tax historically developed in South Africa.

[144] Contained in section 35A of the ITA

[145] Sections 47A to 47K of the ITA

[146] This tax was known as the Non-resident Shareholders Tax (NRST) and was repealed by Act 21 of 1995.

The South African withholding tax on royalties paid to non-residents is the closest match to the withholding tax on sportspersons. Its constituent parts are similar in that the tax is a final tax levied on specific income. The legal liability for these taxes rests on the non-resident, with resident payers responsible for withholding the tax.

Prior to 2000, section 35 did not apply as a withholding tax. Rather the gross amounts were deemed to have deductible expenses of 70%, leaving 30% to be added to the non-resident's other South African taxable income and taxed in terms of the normal tax rules. Section 35 has always fallen within "normal tax" for the purposes of the ITA. In all 64 South African DTAs one of the taxes covered is normal tax.

Act 59 of 2000 converted this system into a final withholding tax system, introducing a withholding tax rate of 12% in line with the recommendation of the Katz Commission in their Fifth Interim Report (Katz, 1997). The 16 treaties[147] in force but concluded after the introduction of section 35 as a withholding tax all separately list the withholding tax in the existing taxes paragraph. This is also true for all three of the treaties reviewed that are not yet in force. This clearly demonstrates that the withholding tax was considered substantially different to normal tax and required separate listing. It is submitted that the conversion of section 35 to a withholding tax has removed the section for all practical purposes from the scope of normal tax as contemplated in the ITA and the South African DTAs.

It is submitted that for those DTAs concluded after the withholding tax was introduced and where the withholding tax on royalties was included in the existing taxes paragraph, the withholding tax on sportspersons will fall within the scope of the specific DTA.

For those DTAs concluded prior to section 35 changing to a withholding tax, it must first be established whether section 35 falls within the scope of those specific treaties before a conclusion can be reached concerning the withholding tax on sportspersons.

[147] The 16 treaties also include those treaties that have the equivalent of OECD Model Article 2(1) and 2(2). Of these 16 treaties, only 2 do not have the equivalent of OECD Model Article 2(1) and 2(2). In addition, the treaty concluded with Mozambique not yet in force also does not have the equivalent of Article 2(1) and 2(2) of the OECD Model.

Withholding tax on royalties was not the first withholding tax introduced to the South African ITA. The first withholding tax was known as the Non Resident Shareholders Tax.[148] This withholding was made against dividends payable by South African companies to non-resident shareholders. This was levied at a time that South African dividends carried normal tax consequences for resident South Africans. The withholding was a flat rate of tax (adjusted over different periods).

Another withholding tax called the non-resident tax on interest[149] was levied at 10%. "When interest received by non-residents was still taxable, it was subject to both normal South African tax and NRTI. The NRTI was then creditable against the normal tax" (Katz, 1997). The tax, repealed in 1988, was levied against interest payments made by residents to non-residents.

Both the non-resident shareholders tax and the non-resident tax on interest were separately listed on the older treaties concluded by South Africa (and that remain in force).[150]

It is submitted that the non-resident shareholders tax, as a final tax on a specified gross amount, is substantially similar to the withholding tax on royalties and the withholding tax on sportspersons. It follows that as South Africa has historically developed withholding taxes similar to the withholding tax on sportspersons since the inception of the ITA 58 of 1962, treaties concluded after 1962 will include the withholding tax on sportspersons within the ambit of Article 2. This is also in line with the general purpose of Article 2, namely to be as inclusive as possible and only exclude taxes specifically excluded by the Contracting States from the scope of the DTA.

A single treaty still in force was concluded before 1962, prior to the ITA 58 of 1962 and before South Africa became a Republic. The treaty with Zambia was concluded on 22 May 1956 and was entered into force in South Africa on 31 August 1956. Zambia was a previous colony of the United Kingdom. As the United Kingdom has withholding taxes in its history,

[148] This tax was contained in sections 41 to 47 of the ITA. These sections were enacted with the ITA 58 of 1962 and repealed by Act 21 of 1995

[149] This tax was levied in terms of section 64A of the ITA. The section was added in terms of Act 95 of 1967 and repealed by Act 90 of 1988.

[150] NRTI only appears in four treaties still in force, namely: Germany, Israel, Malawi, Netherlands. NRST is mentioned in 23 treaties currently in force (including the four treaties mentioning NRTI).

it is submitted that the scope of the Zambian treaty (drawn from English law) would include the withholding tax on sportspersons.[151] The same is true of the DTAs with Grenada and Sierra Leone (which remain extensions of the 1946 United Kingdom-South Africa DTA).

4.3. CONCLUSIONS

The objective of this chapter was to establish whether the withholding tax imposed on sportspersons in South Africa would be considered as one of the taxes covered by all the South African DTAs in force as at 1 June 2008.

The withholding tax on sportspersons was introduced after the DTAs as at 1 June 2008 had been signed. While the tax was not contemplated by the time the treaty was negotiated, the taxes covered article of each of the DTAs in force is sufficient in scope to include this subsequently introduced income tax.[152]

That the tax is contemplated within the scope of the DTAs in force should assist the prevention of double taxation. The implications of the sportsperson DTA article are considered in chapter 5.

[151] See http://www.taxlinks.com/rulings/1960/revrul60-288.htm for withholding tax rates applicable in terms of a United Kingdom DTA extended to its colonies (including the Federation of Rhodesia and Nyasaland – which including what is now Zambia).

[152] Note that the withholding tax on sportspersons is also not mentioned in DTAs signed after 1 August 2006 (namely DTAs with Saudi Arabia; Portugal; Germany; Mozambique and protocols with Australia and the Netherlands do not extend to the withholding tax on sportspersons).

CHAPTER 5

SPORTSPERSON ARTICLE IN SOUTH AFRICAN DOUBLE TAX TREATIES

5.1. INTRODUCTION

The sportsperson article in South African DTAs in force at 1 June 2008 is generally modelled on the OECD Model Article 17 ("the sportsperson article") in existence at the time the DTA was negotiated. This chapter analyses the equivalent article in the South African DTAs.

The OECD Model has been the basis for the inclusion of the sportsperson article and it is therefore necessary to evaluate the rationale for its inclusion (see 5.2. below). As not all South African DTAs are based on the OECD Model, other model conventions (UN and USA) are also examined.

In chapter 2 (see 2.4 particularly), the interpretational rules applicable to South African DTAs were examined. In all of the South African DTAs, recourse is had to the domestic definitions unless the context of the DTA indicates otherwise. Chapter 2 also demonstrated that the OECD Commentary is of limited assistance to the South African courts in deciding a DTA matter, rather the South African general rules of interpretation would apply in the absence of any relevant case law or specific legislation. In applying the interpretational rules, the intention of the negotiating parties is of particular relevance. The OECD Commentary was shown to be an indicator of the intention of the parties where there are no deviations from the Model article. However, only the OECD Commentary in existence at the time the treaty was negotiated would be considered unless the commentary inserted later is a mere clarification (but not extension) of the scope of the relevant article. This argument is revisited in 5.3 below in the context of the sportsperson article to determine whether the international interpretation of the term "sportsmen"[153] should apply in preference to the domestic definition (and interpretation) (see 3.2.2) and extended in 5.4 in an analysis of who is included in the term "sportsmen" in the Model Conventions (and by implication the South African DTAs). If the scope of the term is narrower than that applied in the domestic legislation, it would imply that

[153] Included in this reference to "sportsmen" is the term "athlete" as contained in earlier Model Conventions and South African DTAs.

all persons contemplated in the sportsperson article fall within the withholding tax regime. Should the term have a wider scope, then some sportspersons will be taxed on a withholding tax basis and others will be taxed in terms of the normal tax provisions. This would indicate a flaw in the domestic legislation.

Once the persons governed by the sportsperson article have been identified, the income falling within the scope of the article needs to be examined (see 5.5 below). In particular, the issue of apportionment of world-spanning incomes is examined.

Sportspersons (at least those high income "sports stars") could interpose an entity between themselves and the source State. The entity could be resident in the State in which the sportsperson is resident or in a third State. While originally introduced as an anti-avoidance measure, the entity paragraph has extended beyond this original purpose with a direct impact on sportspersons from most States visiting South Africa. The purpose of the entity paragraph is examined in 5.6.1 and its application in 5.6.2. Finally interaction of the entity paragraph with the South African withholding tax system is examined in 5.6.3.

The OECD introduced into its commentary the optional use of a "cultural exchange" or "public funds" paragraph. Despite not being included in the OECD Model itself, this optional paragraph is widely used in South African DTAs. This optional paragraph's application and other overrides or deviations found in the sportsperson article are examined in 5.7.

Recent developments in international circles are examined in 5.8. Brought sharply into focus in recent European Court of Justice judgments is the use of the gross basis of taxation. In addition, with the purpose of DTAs being both the avoidance of double taxation and the prevention of fiscal evasion, the Netherlands have since 1 January 2007 stopped taxing sportspersons performing in the Netherlands where such persons are resident in a State with which the Netherlands has a DTA. Potential considerations for South Africa are discussed in the light of these developments.

Finally this chapter provides some general comments regarding the interaction between the South African withholding tax and the DTA concepts discussed earlier.

5.2. THE PURPOSE OF THE SPORTSPERSON ARTICLE

5.2.1. The sportsperson article

The first appearance of an article concerning sportspersons in Model Conventions consisted of only one paragraph. This initial paragraph (and article) concerned the sportsperson directly. Later a second paragraph was introduced which addressed the taxation of legal entities owned by or employing sportspersons on amounts earned as a result of the sportspersons' activities.

To distinguish these paragraphs from the article as a whole (the "sportsperson article"), the following terminology has been adopted. This first paragraph has been termed the "sportsperson paragraph" as it concerns the sportsperson directly. The second paragraph concerns the taxation of entities (or other persons) receiving income as a result of the sportsperson's activities and has therefore been termed the "entity paragraph". To illustrate, the 2008 OECD Model sportsperson article is shown below:

> "Article 17 – Artistes and Sportsmen [the "sportsperson article"]
>
> 1. Notwithstanding the provisions of Articles 7 [Business Profits] and 15 [Income from Employment], income derived by a resident of a Contracting State [the "residence State"] as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State [the "source State"], may be taxed in that other State [the "sportsperson paragraph"].
>
> 2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised" [the "entity paragraph"].

5.2.2. Reason for references to "athletes" in DTAs prior to the 1963 OECD Model

Molenaar (2005a) (referring to Nitikman (2001)), identifies the first special treatment for artistes (and athletes) as appearing in 1939 in the USA – Sweden DTA. In documents concerning the negotiations it was clear that the added reference to "professional athletes" was inserted at the insistence of the USA delegation. In essence, the provision provided that the exemption from USA taxation, where insufficient time was spent in the USA, did not extend to "the professional earnings of such individuals as actors, artists, musicians and professional athletes".[154] However, despite this insistence, there appears to be no specific

[154] Molenaar (2005a) at 25 and noted by Sandler (2008) at 218

justification for the clause. Molenaar continues: "It has been suggested that the US negotiators in 1939 recognized the possibility of Swedish actors making large sums of money in the United States in a short amount of time, without needing the facilities that would normally give rise to a permanent establishment, and thus found it necessary to capture the tax on such income by inserting Article XI(d).[155] This seems to be somewhat strange, given what must have been the small number of Swedish actors or athletes coming to the United States in 1939. Indeed, in its explanation, just below the above quotation, the Treasury Department admitted that the amount of income involved under Article XI was 'trifling'."[156] Whether the clause was prompted by the 1932 Olympics in Los Angeles[157] is not known (although Sweden[158] was certainly a participating country). The DTA between the USA and Canada contained a similar provision to the USA-Sweden DTA, as did the USA-United Kingdom DTA (initially). Both countries also participated in the 1932 Olympic Games.

The DTA concluded between the USA and the United Kingdom in 1945 was challenged on the basis that the clause inserted for artistes and athletes was discriminatory (despite a clause similar to that of the USA-Sweden DTA being included in other USA concluded DTAs). The clause was removed from the USA-United Kingdom DTA by protocol in 1946. However, many of the subsequent DTA negotiations in the USA included an article similar to that contained in the USA-Sweden DTA.

In 1951 committee hearings concerning a number of DTAs negotiated by the USA, debate was again heard concerning the discriminatory nature of an inserted "athletes and

[155] This sub-paragraph in the DTA was an override within an "Income from Employment" type article and provided that the exclusion from taxation in the source State for short stays: "shall have no application to the professional earnings of such individuals as actors, artists, musicians and professional athletes" (Molenaar, 2005a: 25)

[156] Molenaar (2005a) at 26

[157] "There were 116 events in 14 sports in the 1932 Summer Games. The events included athletics, boxing, cycling, diving, equestrian, fencing, gymnastics, hockey, modern pentathlon, rowing, shooting, swimming, water polo, weightlifting, wrestling and yachting". Sourced at http://www.mapsofworld.com/olympics/los-angeles-usa-1932-olympics.html

[158] Other participating countries included: "Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Colombia, Czechoslovakia, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Haiti, Hungary, India, Ireland, Italy, Japan, Latvia, Mexico, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, South Africa, Spain, Switzerland, United States, Uruguay and Yugoslavia". Sourced at http://www.mapsofworld.com/olympics/los-angeles-usa-1932-olympics.html

entertainers" clause. The negotiators defended their position providing: "in the treaties negotiated between 1946 and 1951 the United States had been successful in following the 1946 directive and excluding the artistes' article, but the South African and New Zealand delegations had insisted on inserting such provisions in their treaties"[159] and further that "the United Kingdom, in all treaties other than the 1946 US Protocol, had inserted an artistes and athletes clause, that the South African and New Zealand delegations therefore wanted such a clause in their treaties, that in treaty negotiations the US negotiators had won some points, lost some points and simply felt that they had to give in on this point to get the fixed-base exemption for the majority of US persons working abroad".[160] The negotiators successfully defended their position and the clause was retained in those USA DTAs. Almost all DTAs concluded by the USA thereafter included an "athletes" clause.

Molenaar adds that Germany in the 1950s and 1960s concluded a number of DTAs on a basis similar to the USA-Sweden DTA (i.e. excluding from exemption artistes and sportspersons temporarily in the source State. However, he adds that there appears to be no specific cause for the insertion of that clause.

5.2.3. The OECD Model Conventions and the purpose of the sportsperson article

The OECD was the successor to the OEEC (Organisation for European Economic Cooperation). Prior to the OECD 1963 Model Convention, the OEEC in its 2nd Report of July 1959 introduced a double taxation model article for athletes. This was taken in its entirety, apart from minor textual amendments having no impact on this discussion, into the OECD Model of 1963.[161]

On 30 June 1963, the OECD published its first Model and Commentary. The 1963 OECD Model contained a sportsperson article that provided:

> "Notwithstanding the provisions of Articles 14 [Independent Personal Services] and 15 [Dependent Personal Services], income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised".

[159] Molenaar (2005a) at 29

[160] Molenaar (2005a) at 30 with Sandler (2008) agreeing stating: "By 1959, it was common enough to warrant inclusion in the OEEC's draft treaty provisions and became Article 17 of the 1963 OECD Draft treaty".

[161] Refer to Molenaar (2005a) at 34 and Sandler (2008) at 218

The Commentary released in support of the Model provided the following explanation for the inclusion of the specific sportsperson article:

> "1. The provisions of Article 17 [the sportsperson article] relate to public entertainers and athletes and stipulate that they may be taxed in the State in which the activities are performed, whether these are of an independent or of a dependent nature. This provision is an exception, in the first case, to the rule laid down in Article 14 [Dependent Personal Services], in the second case, to the rule laid down in paragraph 2 of Article 15 [Independent Personal Services].
>
> 2. This provision makes it possible to avoid the practical difficulties which often arise in taxing public entertainers and athletes performing abroad. Certain Conventions, however, provide for certain exceptions such as those contained in paragraph 2 of Article 15 [Independent Personal Services]. Moreover, too strict provisions might in certain cases impede cultural exchanges. In order to overcome this disadvantage, the States concerned may, by common agreement, limit the application of Article 17 [the sportsperson article] to independent activities by adding its provisions to those of Article 14 [Dependent Personal Services] relating to professional services and other independent activities of a similar character. In such case, public entertainers and athletes performing for a salary or wages would automatically come within Article 15 [Independent Personal Services] and thus be entitled to the exemptions provided for in paragraph 2 of that Article".

The first paragraph of the commentary explains the application of the rule (see 5.4. and 5.5. below). The second paragraph provides some clues to the inclusion of the sportsperson article. Reference is made only to the "practical difficulties" in taxing entertainers and athletes. However in the commentary pertaining to independent personal services and dependent personal services no such "practical difficulties" appear to arise. Furthermore, it is unclear from this commentary whether the practical difficulties arise in the source State or the residence State.

Difficulties that may have arisen could have included administrative implications. However, such administrative difficulties should also have occurred for independent personal services (without a fixed base) or short stay dependent personal services.[163] Both such services are taxed exclusively in the residence State in terms of the relevant DTA article in an apparent attempt to overcome such difficulties. Why then should similar difficulties result in tax in the source State for entertainers and athletes as opposed to exclusive taxation in the residence State? The commentary provides no answer to this seemingly contradictory stance.

[163] Where such short stay is without a source State employer or permanent establishment.

Equally, an anti-avoidance purpose (to defend against the mobility of the athletes[164]) to this article is confounded by the potential for individuals engaged in independent personal services or dependent personal services to be just as mobile.

The most likely interpretation of the "practical difficulties" is evasion by non-disclosure in the residence State. To combat such evasion, a right to tax the performance income of the athlete is provided to the source State. Such taxation would yield a claim for a tax credit in the residence State resulting in the disclosure in the residence State. However, the question that remains unanswered is why athletes and entertainers were singled out amongst a multitude of mobile workers.[165] No specific study appears to have been undertaken to establish that this group of taxpayers were more likely to evade taxation than other mobile workers. Furthermore, if evasion was widespread amongst mobile workers, then surely providing the source State with the power to tax in the Independent and Dependent Personal Services articles rather than granting exemption would have reduced the extent of the evasion.

No reservations or observations were entered with respect to this article in the 1963 OECD Model.

The 1977 OECD Model brought about some changes to the wording of the sportsperson paragraph, providing:

> "Notwithstanding the provisions of Articles 14 and 15, income derived by *a resident of a Contracting State* as an ~~*public*~~ entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State" (*emphasis added* and further, the 1977 OECD Model altered the references to the persons to the singular).[166]

The Commentary to this 1977 OECD Model sportsperson paragraph (while containing some textual and grammatical amendments) did not add anything to the discussion of the original purpose of the provision. The ambiguous "practical difficulties" comment remained. The Commentary did, however, provide that Government employed entertainers and athletes were to be considered in terms of the Government Service article (Article 19) and not the sportsperson article.

[164] Thus their ability to evade tax through non-disclosure.

[165] Nitikman (2001) and Molenaar (2005a) reached similar conclusions.

[166] The 1977 OECD Model also introduced the entity paragraph (discussed in 5.2.6 below).

In 1987, the OECD produced a report[167] on the Taxation of Entertainers, Artistes and Sportsmen (the "1987 OECD Report"). Vogel (1997: 971) summarised the comments in that report as to the purpose of the sportsperson article as: "Primary taxation of income derived by an entertainer or sportsmen from personal activities as such is attributable to the State of the place of performance which is considered to be the State of source. This arrangement is premised on the notion that the residence State of an artiste or sportsman will often be unable to keep track of such performers' income due to their mobility and to the numerous different income-earning opportunities available to them. Residence State taxation would be highly dependent on information supplied by the respective State of performance. Furthermore, primary taxation in the country of performance is likely to be more effective and thus more accurate in the light of the potential tax collection difficulties faced by the residence State".[168]

This attempt merely represents an expansion of the vague "practical difficulties" comment of the 1963 and 1977 OECD Models. The 1987 OECD Report adds: "There are no reliable quantitative estimates available of tax non-compliance in this area, whether in terms of the amount of income involved or revenue forgone".[169] According to the Report, countries in which studies were undertaken provided evidence of non-compliance (although from the earlier comment, none of the evidence was quantitative). The studies indicated particular non-compliance (not distinguishing between intentional or naïve non-compliance) "amongst performers at the low end of the income scale whose activities are particularly transient in nature". It is submitted that such evidence still does not provide a sufficient motivation for the separation of treatment of sportspersons and entertainers from other mobile workers.[170]

The strongest motivation for the sportsperson article appears in paragraph 7 of the OECD Report, in which it was stated: "Sophisticated tax avoidance schemes, many involving the use

[167] The report was based on 19 country submissions up to 1986. The countries that provided reports included: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and the United States.

[168] Vogel (1997) draws this inference from paragraphs 16, 18 and 35 of the OECD Report.

[169] OECD Report (1987) at paragraph 6

[170] Molenaar (2005a) advocates for the abolition of Article 17, whereas Sandler (2008) advocates introducing de minimis rules to remove the "struggling" or low-paid sportspersons and to further include in the scope of the article other persons commanding large "performance" fees for short stays e.g. motivational speakers etc. It is submitted that it would be more appropriate to extend the article to all highly paid mobile workers for short stays should an extension of scope be seen as the best alternative.

of tax havens, are frequently employed by top-ranking artistes and athletes. Whilst some countries do not consider such activities of major importance, given the limited number of persons involved in international activities of this sort and the relatively small amounts of revenue involved, *there is general agreement that where a category of – usually well-known – taxpayers can avoid paying taxes this is harmful to the general tax climate, which therefore justifies coordinated action between countries*" (*emphasis added*).

With respect, the well-known (and well-off) taxpayers involved in tax avoidance schemes will continue to be involved in avoidance schemes despite targeted (and general) anti-avoidance measures. Secondly, targeted anti-avoidance measures such as the sportsperson article can negatively impact a multitude of other taxpayers not contemplated in the justification for the anti-avoidance measure. It is submitted that due to the "relatively small amounts of revenue involved" the OECD should rather have analysed all mobile workers with a view to consistent taxation for all.[171] In addition, co-ordinated action between the countries could be found in better exchange of information and assistance in the collection of taxes (see chapter 6) rather than the application of a specific article to counteract avoidance of taxes.

The subsequent OECD Model Commentaries made no improvement on the identification of the purpose of the sportsperson article (the only apparent purpose being one of prevention of tax evasion). The attempt to use the sportsperson article to prevent tax evasion by sportspersons not disclosing their income in the residence State does not take into consideration that such persons are equally likely to not disclose their income in the source State. Even if the evasion purpose can be used as clear justification for the sportsperson article, it is unclear why only this category of persons was identified out of the multitude of mobile workers as requiring specific preventative action. Without an additional substantive purpose, it is submitted that the sportsperson article be withdrawn from the OECD Model and sportspersons be included with other mobile workers either in the other existing DTA articles or in the creation of a new DTA article concerning all highly mobile workers.[172]

[171] Sandler (2008: 216): "I do not advocate abolishing Article 17 and leaving the existing jurisdiction-allocation rules in Articles 7 and 15 to apply. Rather, I advocate revising Article 17 to give the source country primary jurisdiction to tax any individual who earns in that country personal services income that exceeds a relatively high threshold amount – say 100,000 US dollars (USD)".

[172] Sandler (2008) while not advocating the deletion of Article 17 states: "If the rationale for Article 17 is tax avoidance – the difficulty of taxing 'itinerant activities' of artistes and sportsmen, as suggested by the OECD in

5.2.4. The UN Model Convention and the purpose of the sportsperson article

While development was undertaken during this time frame, the first UN Model (1980) had not yet been published. By 1980, the UN Model reproduced the OECD Article and much of its Commentary.

5.3. "UNLESS THE CONTEXT OTHERWISE ALLOWS" – THE DTA AND DOMESTIC LAW CONFLICT

Before any analysis of the scope of the sportsperson article can be undertaken, it must first be established whether the domestic legislative meanings are to be used for the interpretation of the article (and terms within the article) or whether an international interpretation, for example, based on the OECD Commentary, is to be used.

5.3.1. Sportspersons, sportsmen and athletes

The South African courts have not decided on whether the term "athletes" (or "sportsmen" in later Model Conventions) should be interpreted based on the domestic definition of "sportsperson" or whether the context of the relevant DTA provides sufficient clarity as to the meaning.[173]

The 1963 OECD Article 3(2)[174] provides:

> "As regards the application of the Convention by a Contracting State any term not otherwise defined shall, *unless the context otherwise requires*, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of the Convention" (*emphasis added*).

There remains extensive debate in international circles as to the meaning of the phrase "unless the context otherwise requires".[175] The debate is centred on whether the contextual meaning

1987 – it is difficult to see why Article 17 draws the distinctions that it does. Indeed, one must wonder why the provision is limited to the world of entertainment and sports".

[173] As the withholding tax on sportspersons was only introduced with effect from 1 August 2006, no cases have been heard by the South African courts.

[174] Discussed in Chapter 2 section 4.3.

[175] This is ironic considering the 1963 OECD Commentary on Article 3(2) that provides: "The rule of interpretation laid down in paragraph 2 corresponds to similar provisions normally appearing in double taxation Conventions".

is given primary status or whether recourse is had first to the domestic definition. Authors are divided on the subject: some advocate the contextual approach[176] as the primary means of interpretation whereas others support immediate recourse to domestic law[177] for terms not defined by the DTA.

Even negotiated DTAs are not consistent in this regard, increasing the difficulty of this issue. The DTA between Germany and Sweden, for example, provides that domestic interpretation only applies if the context requires. This reversal of the wording supplied in the OECD Article 3(2) places primary interpretation on the DTA text instead of the domestic legislation.[178] In Italy, the Italy-Switzerland DTA does not contain an equivalent to Article 3(2)[179] and therefore the text of the DTA provides the meaning with no recourse to the domestic law. Again in Italy,[180] the Italy-Yugoslavia DTA merely eliminates the words "unless the context otherwise requires"[181] thereby providing exclusive interpretation of undefined DTA terms to domestic law.

The terms "athletes" or "sportsmen" are not defined in the DTAs in force at 1 June 2008. In terms of the above interpretation article,[182] recourse is to the domestic definition unless the context otherwise requires.

The domestic definition at the time the DTA is to be applied is compared against the context (i.e. an ambulatory interpretational approach should be followed – see chapter 2).[183] Furthermore, the "context", including the OECD Commentary as an indicator of the intention of the negotiating parties, is generally fixed at the point the DTA was concluded.[184]

[176] See, for example, Lang (2000) at 20-28 and Molenaar (2005a) at 66

[177] See, for example, Vogel (1997) at 213-216

[178] See Lang (ed) (2001) at 146 and Vogel (1997) at 209

[179] See Lang (ed) (2001) at 223

[180] Demonstrating the lack of consistency with a single State's DTAs

[181] See Lang (ed) (2001) at 224

[182] Articles similar to the OECD Article 3(2) appear in all South African DTAs in force at 1 June 2008.

[183] This is of particular relevance as all the South African DTAs in force at 1 June 2008 were concluded before the withholding tax on sportspersons became effective (on 1 August 2006).

[184] This is supported by the 2008 OECD Commentary on Article 3(2) where it provides (in paragraph 12): "The context is determined in particular by the intention of the Contracting States when signing the Convention".

In establishing the context, it is submitted that regard to the purpose of the DTA must be considered and not just the positioning of the term or phrase within the relevant article of the DTA. The 1963 OECD Model has as the main objective of the model convention the avoidance of double taxation. Underlying this objective (and only stated specifically in later model conventions) is the prevention of fiscal evasion. It is submitted that to achieve the aim of the avoidance of double taxation, contracting states should have an equivalent understanding of what is meant by the terms used in the DTA, supporting a contextual approach. It is submitted that the OECD Commentary at the time of entering into the DTA could indicate the mutually understood term (and would be of persuasive value in the South African courts) (see chapter 2).

It is unclear from the interpretation article whether the DTA term must be identical to the term used in domestic law. Whether the court will apply the domestic definition of "sportsperson" against the use of the term "athlete" in a DTA (e.g. Zambia) or even refer to the domestic definition remains to be seen.

The domestic withholding tax provisions were introduced after all the DTAs in force (at 1 June 2008) had been concluded. Despite this later introduction of the withholding tax, the South African Constitution[185] provides that an international interpretation should prevail in the case of conflict. It is submitted that where the definition of "sportsperson" in a domestic context extends beyond the scope of the meaning of "athlete" or "sportsman" in a DTA, the latter meaning should prevail provided the context of the DTA is clear.[186]

A broader definition of athlete or sportsman in a domestic context,[187] where the definition was introduced after the conclusion of the DTA under review, may be considered a unilateral departure from the intention of the negotiators at the time of entering into the DTA, or at worst be considered to be a South African DTA override. Both of these situations are to be avoided on the customary international law principle of good faith. Furthermore, accepting a broader domestic definition of athlete or sportsperson for DTA purposes extends the scope of the article in favour of the source State and thereby such State taxes persons that would in

[185] Also embodying the customary law principles from the VCLT (see Chapter 2)

[186] The South African DTAs concluded by 1 June 2008 all place the primary interpretation on the term in context where that differs from the domestic definition.

[187] The definition of "sportsperson" was introduced into the South African Income Tax Act with effect from 1 August 2006 (see Chapter 3 for details).

terms of another distributive article be exempt from tax in that State.[188] In these circumstances it is clear that the context would override the domestic definition.[189]

For South Africa, it is submitted that where recourse to the domestic legislation is considered where the term is not defined in the DTA (and the context does not indicate otherwise), this should be tempered by the principle of good faith,[190] particularly in the case of the South African DTAs concluded prior to the introduction of the withholding tax on sportspersons.[191] Furthermore, the objective of the DTA is to prevent double taxation. On this basis, where subsequent domestic legislation shifts persons previously considered to be exempt in terms of the DTA into articles permitting taxation, the contextual approach should be favoured. The contextual understanding of the term can be drawn from the text of the DTA and the OECD Commentary (as at the date the DTA was concluded) where the DTA was based on the OECD Model at the time.

As the South African DTAs in force at 1 June 2008 were all concluded prior to the definition of "sportsperson" being inserted into the South African Income Tax Act,[192] unless the specific DTA requires the use of the domestic definition exclusively,[193] the interpretation will be drawn from the Model Convention on which the DTA is based (as the scope of the sportsperson article is narrower than the South African definition (see 3.2.2. above and 5.4. below) and this conflict therefore favours the international interpretation).[194] It is further

[188] See Engelen (2004) at 492

[189] Engelen refers to decisions of the *Hoge Raad* for support of this principle.

[190] Engelen (2004) reached a similar conclusion, stating that: "the principle of good faith puts a limit on the reference to domestic law for the purpose of the interpretation and application of a tax treaty and prevents a contracting State from eroding or evading its obligations under the treaty by subsequently amending in its domestic law the scope of terms not defined in the treaty, either by means of legal definition or otherwise" (at 502). Also in support of this view is Van der Bruggen (2003).

[191] All the South African DTAs in force at 1 June 2008 were concluded prior to the introduction (with effect from 1 August 2006) of the domestic legislation definition of "sportsperson".

[192] See Appendix C for the table of treaties and the date of conclusion.

[193] The Australia-New Zealand DTA demonstrates that an international interpretation may differ from a domestic definition. This DTA makes overt reference to support staff (e.g. trainers) with regard to sportspersons to include such persons in the term. This aligns with the Australian domestic law but differs from the international contextual understanding of the term "sportsmen" in the OECD Model.

[194] None of the South Africa DTAs in force at 1 June 2008 require exclusive reference to the domestic legislation. All permit recourse to a contextual interpretation of a term in the absence of a domestic law definition. If future negotiated DTAs provided for exclusive recourse to the domestic definition, the

submitted that the domestic definition of "sportsperson" will not be appropriate in a DTA context as the definition applies only to the persons and incomes subject to the withholding tax regime (discussed in Chapter 3) and is not a definition for the purposes of the entire South African ITA.[195] The DTA concept (and context) may extend beyond the scope of the incomes contemplated for the purposes of the domestic withholding tax.

It is therefore submitted that the interpretation (drawn from the OECD Commentary or other appropriate model convention commentary) indicates the intention of the negotiating parties and is therefore the correct source for the terms used.

5.3.2. "Income" – gross or net?

While a contextual meaning is preferred for the interpretation of South African DTA's, it is not always appropriate. The meaning of "income" appears to vary in the OECD Model between contextual meanings of a "net income" and a "gross income".[196]

From a South African perspective, whether the term is used in a net or gross context has little bearing on the DTAs. Firstly, "income" as defined in the South African ITA refers to gross income (as defined) less exempt income (before the inclusion of capital gains).[197] As the sportsperson article is conferring the right to tax to the source country, exemptions of the amounts received would result in no taxation in the source State and as a result, the DTA would not be applicable.

The term "income" does not apply (in a domestic context) to the withholding tax on sportspersons (see Chapter 3). Rather, the withholding applies to amounts received or accrued (i.e. a gross basis). As the domestic definition of income is of no relevance to the

interpretative position would be clear, however, it is submitted that significant conflicts could arise if different domestic definitions are used by the Contracting States.

[195] Definitions for the purposes of the entire ITA are contained in section 1, whereas the definition of "sportsperson" only for withholding tax purposes is contained in section 47A (the relevant section only) of the ITA.

[196] Bramo (2007: 73-82). For further analysis of the concept of income, see Holmes, K. 2000. *The concept of income – A Multi-Disciplinary Analysis*, International Bureau of Fiscal Documentation: The Netherlands.

[197] In addition, the defined term "income" in the South African ITA is not always used in accordance with the definition. For example, in the context of trusts, the conduit pipe principle carries "income" in the form of dividends through the trust to be taxed in the beneficiaries hands – this being a flow through of the gross dividend before the application of any exemptions (contrary to the defined usage).

withholding tax applied, it is submitted that the domestic definition does not give any contextual meaning to the term "income" as used in South African DTAs.

For DTA interpretation, it is submitted that the term "income" is used in its broadest sense. Larking (2001: 188) states: "Because of the differences between countries' systems, direct comparisons between terms can rarely be made". Applying this concept and considering the purpose of a DTA, namely to allocate taxing rights between States based on common understanding, implies that the meaning should be drawn from the context of the DTA article rather than an individual country's domestic legislation. In the context of the sportsperson article, it is apparent from the context and the discussion in the OECD Commentary that, unless the Contracting States specifically agree otherwise, "income" appears to be determined on a gross basis. Such interpretation also matches the application by most countries of a withholding tax on a gross basis.

It is therefore submitted that in a South African DTA context, for normal tax purposes and for the withholding tax purpose, the term income can be applied to a net or a gross basis. As the South African legislation applies a gross basis for withholding tax purposes, such application is used for the term "income" in the context of the sportsperson article.[198]

5.4. THE NOTION OF A SPORTSPERSON IN INTERNATIONAL DTAS

5.4.1. "Athlete" versus "Sportsman" or "Sportsperson"

The change in usage from "athlete" to "sportsman" in the OECD and US Model Conventions and "athlete" to "sportsperson" in the UN Model Convention is discussed to establish whether the change in terminology resulted in a change of scope of the conventions. This is particularly important in South Africa. With the bulk of the South African DTAs being based on the OECD Model Conventions (as applicable at the time the DTA was negotiated), the OECD Model and Commentary changes could directly influence the interpretation of a specific South African DTA (see Chapter 2).

[198] While this approach may conflict with the EU approach following the ECJ decisions of *Gerritse* and *Scorpio* (see 5.8 below), such decisions are not applicable in South Africa.

The 1963 OECD Model refers to "public entertainers and athletes".[199] The 1963 OECD Commentary did not define (or provide examples of) the term "athlete" (although the examples of theatre, motion picture, radio or television artistes, and musicians were supplied in the text of the article for "entertainers"). In addition, the 1963 OECD Commentary provided no further examples (for either category). Without overt guidance, the ordinary meaning of the term should then be adopted as the intention of the negotiators. It also could not have been the intention of the South African negotiators to use a domestic definition as none existed in the domestic tax law.

The term "athlete" is defined by a variety of Oxford dictionaries as "a skilled performer in sports and *physical activities*, esp. Brit. in track and field events" (emphasis added)[200] or "a person who is proficient in sports and other forms of *physical exercise*. Brit. a person who takes part in competitive track and field events (athletics)" (emphasis added).[201] The Merriman-Webster dictionary defines "athlete" as "a person who is trained or skilled in exercises, sports, or games *requiring* physical strength, agility, or stamina" (emphasis added).[202] Each of these definitions focuses on physical performance and skill thereby including those activities that are not considered traditional athletic activities e.g. golfers and racing drivers in which skill (and to an extent, physical performance) is applied. Excluded from such scope would be activities of a non-physical nature (although still requiring skill), such as chess, billiards, bridge etc.

The 1977 OECD Model Commentary did not expand on the 1963 OECD Model as to what is meant by "athlete". The 1980 UN Model made specific reference to this omission in the

[199] Similar wording appears in the South African DTAs with Zambia and the territory extension DTAs still in force with Sierra Leone and Grenada, albeit not in a specific sportsperson article but as an exclusion from exemption from tax in the source State from the equivalent to the "Income from Employment" OECD article. As the term "athlete" is used in the same context as the 1963 OECD sportsperson article, similar interpretation can be derived.

[200] "athlete n." *The Oxford American Dictionary of Current English.* Oxford University Press, 1999. Oxford Reference Online. Oxford University Press. University of Cape Town. 24 September 2008 [http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t21.e1887] [by subscription]

[201] "athlete n." The New Oxford American Dictionary, second edition. Ed. Erin McKean. Oxford University Press, 2005. Oxford Reference Online. Oxford University Press. University of Cape Town. 24 September 2008 [http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t183.e4392] [by subscription]

[202] "athlete." Merriam-Webster Online Dictionary. 2008. Merriam-Webster Online. 24 September 2008 [http://www.merriam-webster.com/dictionary/athlete] [by subscription]

commentary to its model stating: "In adopting the OECD text, the Group of Experts agreed that the term 'athlete', which, unlike the term 'entertainer' was not followed in paragraph 1 [the sportsperson paragraph] by illustrative examples, was nevertheless likewise to be construed in a broad manner consistent with the spirit and purpose of the article".[203] For UN Model purposes (and interpreted by the UN Model as also applicable to the OECD Model), the term "athlete" referred to activities of an entertaining character. It is submitted that the UN Model commentary also did not extend the term "athlete" into the inclusion of activities involving mental but no physical skill. Rather the lines between artistes and athletes were blurred into a generic "entertainers" category.[204]

Clarification of the term "athlete" was addressed in the 1987 OECD Report on the Taxation of Entertainers, Artistes and Sportsmen. Before the report (and the subsequent 1992 amendments to the title and language within the sportsperson article in DTAs), the term "athlete" had been used. The report addressed this issue as follows:

> "The first issue considered was whether the terms […] 'athletes' were sufficiently broad to cover all the persons it is wished to tax under Article 17. […] As far as athletes are concerned, it was agreed that the intention was to cover sportsmen in the broad sense of the word. The term is not restricted to what are traditionally thought of as athletic events (e.g. running, jumping, javelin throwing). It also covers, for example, footballers, golfers, jockeys, cricketers and tennis players, as well as racing drivers. Article

[203] The 2001 UN Model included a similar discussion, however substituted the word "sportsperson" in favour of the term "athlete" as used in the earlier UN and OECD Models and the term "sportsman" as used in the later OECD Models. This term was adopted to show gender neutrality and not any material deviation from the interpretation of the OECD Model terms used. This is further demonstrated in the Explanatory Memoranda produced with the DTA text in, for example the South Africa – Malaysia DTA Explanatory Memorandum, it is stated: "The entire text has been made gender neutral" immediately following the comment that the DTA was based on the OECD Model. Refer Appendix E for all the South African DTAs and the use of the terms "athlete", "sportsmen" or "sportsperson".

[204] Vogel (1997: 977) and referring to Sandler (1995: 181) includes chess players in the term "sportsman" on the basis of an Italian practice during the 1981/82 chess world championship. It is submitted (and confirmed by Sandler (2008: 224)) that this Italian practice included the chess players generically under Article 17 without reference to a particular term of "sportsman". The chess players were seemingly included as a result of the entertainment characteristic and not due to their physical performance. It is therefore submitted that such activities fall more correctly under the term "artiste" than "sportsman". Vogel (1997) further refers to a German court decision excluding chess players from the scope of article 17 (Case 8 K 3034/94). Sandler (2008) deviates from his earlier position stating: "it would be an improbable stretch even of the term sportsman to include snooker players, card players, darts players, chess players and the like. However, I think it is equally a stretch of the term 'entertainer' to include some of these individuals".

> 17 also applies to other participants in public entertainment such as billiard players, and participants in chess or bridge tournaments".[205]

It is clear from the 1987 OECD Report that the term "athlete" was considered by some countries to be limited to traditional athletic events, such as the narrow interpretation of track and field events, or at least to activities involving physical skill. For South Africa, it is submitted that the ordinary meaning of the word "athlete" in the older DTAs was sufficiently broad to cover activities of physical skill,[206] including those examples listed in the later OECD Model Commentaries.[207] However, the last comment from the 1987 OECD Report merely refers to chess players etc being included in the scope of Article 17[208] and does not specifically include such persons as "athletes". It is submitted that this is correct, however, such persons may be "sportsmen" (the term "sports" including games and pastimes – see 3.2.2) and therefore are more correctly included in the paragraph concerning "sportsmen" than "entertainers". The 1987 OECD Report resulted (in 1992) of the change from "athlete" to "sportsman" in the OECD Model.[209] In addition, it is submitted that a feature of a sporting

[205] Paragraphs 67, 70 and 71 of the 1987 OECD Report. Again, billiards etc were referred to in the context of "public entertainment" and not with reference to physical skill being performed. The report is vague as to the intention to include such persons as "sportsmen" or "entertainers".

[206] See the South African decision in *ITC 1735* (at 464) in which Goldblatt, J considered that the term "athlete" "must have been intended to cover all participants in all physical sporting events, rather than merely a person performing physical exercises".

[207] Vogel (1997: 976) agrees as does Zoubek (2007: 40). Sandler (2008) disagrees stating: "An amendment to the text of the treaty provision, as opposed to an amendment to the Commentary, cannot be given an ambulatory interpretation. Thus, an 'athlete' referred to in an older bilateral tax treaty must encompass a narrower range of individuals than the term 'sportsman'. The term 'athlete' would likely be interpreted to include more than the 'traditional athletic events' of ancient Olympic Games, and therefore footballers, cricketers and tennis players likely would be considered athletes' in any event. However, there is some question as to whether the term would include golfers, jockeys and racing drivers".

It is submitted that the broad nature of the definition of the term "athlete" is sufficient to include such persons of *physical skill* and when considering the intent of treaty negotiators for the DTA to last for many years. Furthermore, ITC 1735 considered a non-resident golfer to be an "athlete" for the purposes of the South African – United Kingdom DTA (1968) (which is no longer in force), indicating that "athlete" was sufficiently broad in scope.

[208] The German decision in Case 8 K 3034/94 concluded that chess was not a sports activity (in the context of the word "athlete" not "sportsman"). Note the Vogel (1997: 977) disagrees with the decision. It is submitted that Vogel is correct. The competitive nature of chess assists to classify such activity as a "sport".

[209] Zoubek (2007:39) makes the point that the change in 1992 based on the 1987 OECD Report was "motivated by the preference of a number of countries which were given to using the term "sportsmen". It should be noted

performance is one of competition. Chess players are more correctly classified as sportspersons than entertainers as such persons "compete" as opposed to the mere "performance" without competition of an entertainer.

While, it can therefore be concluded that the terms "athlete", "sportsman" and "sportsperson" are not entirely equivalent, Molenaar (2008: 249) concludes that the debate concerning "athlete" and "sportsman" does not create difficulties in practice. It is submitted that in most cases this comment is true. Other "sports" such as chess fall between "entertainer" and "sportsman" and therefore fall within the scope of the sportsperson article irrespective of any particular classification.

5.4.2. Necessity of public performance

The term "public" was omitted from the 1977 OECD Model article. According to Vogel this exclusion of the term "public" did not expand the scope of the terms "entertainer" or "athlete". Rather "the fact that sportsmen are grouped together with entertainers appears to indicate that Art. 17 is meant to apply only to such sportsmen as perform in public – directly or via the media".[210] Zoubek (2007: 42) summarises the term "sportsman" as "a person who by skillful and sporting performance […] can attract an audience to watch that person […]".

Where persons do participate in sports, but not in public or via the media, Vogel expresses the view that such persons are not contemplated within the sportsperson article. In support for his view, Vogel refers to a case decided by the Austrian Federal Ministry of Finance[211] that "denied the application of Art. 17(1)[212] MC in favour of a Czech tennis player who did not participate in a public tennis match, but who merely earned income from tennis lessons".[213] With respect, this assumes that there is sufficient clarity for the term exclusively in the context of the article and the meaning does not have to be derived from the domestic (or

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that only DTA's concluded from 1995 in South Africa started using the term "sportsmen" (however the DTA concluded with the Russian Federation in 1995 still used "athlete"). It is submitted that the drive for gender equality in South Africa has resulted in the use of more gender neutral terms, rather than any particular reliance on the UN Model. "Sportspersons" is used in all DTAs concluded since 1999.

[210] Vogel (1997: 977). Authors agree on this point and it is submitted to be correct for South Africa as well.

[211] The decision was based on an article the same as that in the 1977 OECD Model (see 5.2.3)

[212] Note that Article 17(1) (as appears in 5.2.3) was worded similarly to the 1963 OECD Model sportsperson article.

[213] Vogel (1997: 977)

municipal) legislation of the State interpreting the DTA (see Chapter 2.4.2 and 5.2.3 above).[214]

The necessity of public performance results in the exclusion of sports performed where there is no public performance element (directly or indirectly) e.g. scuba diving; mountaineering etc. Competition without public participation (directly or via media coverage) is insufficient to include persons involved in such competitions within the scope of the sportsperson article.

For some persons, even public performance (of a sort) is insufficient. Some international team coaches of, for example, football, are charismatically vocal and sometimes filmed during live competition as much as the players. However, such public performance is not of a nature contemplated within the context of the sportsperson article (see 5.4.4 below).

5.4.3. Professional versus amateur

Despite the necessity of public appearance (and income – see 5.5), the sportsperson does not have to be a professional.[215] This is also true within a South African domestic legislation context (see Chapter 3) and appears to be a common feature of domestic legislation worldwide.[216]

5.4.4. Support staff and sports associated persons

A further implication of the Austrian decision (concerning the Czech coach) is that support staff (for example coaches, team doctors, managers and the like) are not considered to be "athletes" or "sportsmen".[217] Such persons' activities are (in the majority) not performed in public. If synonyms for the term "athlete" are sought in a thesaurus, the following result is found: "sportsman, sportswoman, runner, player; gymnast, competitor, contestant; inf. jock,

[214] For the purposes of the South African DTAs, a contextual interpretation of "athletes" or "sportsmen" is appropriate (see 5.3.1).

[215] See support for this comment in Vogel (1997: 976), Holmes (2007: 321) and Zoubek (2007: 44-45).

[216] See for example Argentina (14) and Australia (14) in Betten (ed) (2007).

[217] This is certainly true in a number of countries, see Betten (ed) (2007). See also Lloyd-Pugh *et al* (2002: 134) and Sandler (2008: 224-225). Refer also to 3.2.2 and the *inclusion* of such persons by the ATO for domestic law purposes.

fitness freak".[218] When examined together the terms appear to indicate direct participation within the sport or competition. However, this ring-fencing of the actual participants (players) in the sport ignores a number of persons actively involved in the sport and equally as mobile (for example coaches of sports teams, caddies to golfers) and whose incentive based earnings (at the least) can be directly linked to certain performances.[219] Yet it appears to be accepted in international circles that the sportsperson article is restricted to the active (direct) participants (players) of the sport and excludes support staff (such as coaches, team doctors etc). Even excluded are persons such as umpires and referees.[220]

The later OECD Models clarified this position. The 2000 OECD Model drew some of the commentary concerning the term "sportsman" from the 1987 OECD Report.[221] The 2000 OECD Model provided:

> "5. Whilst no precise definition is given of the term "sportsmen" it is not restricted to participants in traditional athletic events (e.g. runners, jumpers, swimmers). It also covers, for example, golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers.

[218] "athlete noun" The Oxford American Thesaurus of Current English. Ed. Christine A. Lindberg. Oxford University Press, 1999. Oxford Reference Online. Oxford University Press. University of Cape Town. 2 October 2008 [http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t22.e840]

[219] Sandler (2008: 224) agrees, stating: "In terms of sportsmen, it is clear that players on professional sports teams are included in Article 17 while their coaches and trainers are not. But there are others that pose difficulties even within the context of the broadened term 'sportsman'. Consider two examples. First, some professional sports referees can earn significant sums of money (match-fixing aside). These referees must be physically fit and can be as much in the limelight as many players in a game. Indeed, the audience often has choice words for referees when they consider a game to be poorly officiated. Second, caddies for professional golfers perform their services in public during tournaments. They must be physically fit to carry clubs around an eighteen-hole course and they can be compensated extremely well. […] However it is unlikely that either referees or caddies would be considered sportsmen under Article 17".

[220] A number of foreign court decisions have supported this OECD view, in particular: Case 9 K 147/00 excluded a tennis umpire from being considered as a sportsperson. Other cases excluded from "entertainer" or "performer" persons such as stage directors (Case 9 K 9347/97 and Case I R 26/01); opera directors (Case I R 51/96). However, persons such as conductors are considered within the term of "performer" (Case 93/15/0175).

[221] Note that the term "athlete" was changed to "sportsman" with effect from July 1992 in the OECD Model. It is submitted that nothing turns on this change. Vogel (1997) indicates that the change was a mere clarification and in support refers to Sandler (1995) stating: "[h]e refers to an Italian practice where the participants in the 1981/82 chess world championship were specifically characterized under the artist and sportsman term on account of their 'physical or intellectual skills'"

> 6. The Article also applies to income from other activities which are usually regarded as of an entertainment character, such as those deriving from billiards and snooker, chess and bridge tournaments.
>
> 7. Income received by impresarios, etc. for arranging the appearance of an artiste or sportsman is outside the scope of the Article, but any income they receive on behalf of the artiste or sportsman is of course covered by it".

This commentary has remained unchanged in the subsequent OECD Models issued, including the 2008 OECD Model. The commentary specific to sportspersons does not clarify the position of coaches etc. by overt reference,[222] however, considering the UN Model commentary and the earlier provisions concerning entertainers, the conclusion can be drawn that such support staff are excluded from the scope of the sportsperson article.[223]

The 2006 USA Model has greater clarity as to the scope of the sportsperson article and provides:

> "This Article applies only with respect to the income of entertainers and sportsmen. Others involved in a performance or athletic event, such as producers, directors, technicians, managers, coaches, etc., remain subject to the provisions of Articles 7 [Business Profits] and 14 [Income from Employment]. In addition, except as provided in paragraph 2, income earned by juridical persons is not covered by Article 16 [sportsperson article]".[224]

Clear from the 2006 USA Model is the exclusion of juristic (non-natural) persons and support staff (except for the entity paragraph – see 5.6 below). The sportsperson article is limited exclusively to the actual participant in the sport.

5.4.5. The need for skill and training

Another critical factor in identifying the sportsman is whether specific training or preparation must be performed. Where no training is required, for example game show participants, the

[222] The 1987 OECD Report did refer to an "agreement that a narrow interpretation should prevail and that both the intention and the language of Article 17 do not presently allow the taxation under Article 17 of […] technical staff, etc." (at paragraph 72).

[223] Within paragraph 3 of the 2008 OECD Model Commentary, the commentary provides that the sportsperson paragraph "does not extend to a visiting conference speaker or to administrative or support staff". Also considering the exclusion of directors of films (akin to coaches of a team), it is apparent that the model excludes such persons.

[224] The Comment was similar in the 1996 USA Model that provides: "This Article applies only with respect to the income of performing artists and sportsmen. Others involved in a performance or athletic event, such as producers, directors, technicians, managers, coaches, etc., remain subject to the provisions of Articles 14 [Dependent Personal Services] and 15 [Independent Personal Services]. In addition, except as provided in paragraph 2, income earned by legal persons is not covered by Article 17 [sportsperson article]".

person cannot be classified as a sportsman or athlete (Vogel, 1997: 977).[225] No skill is demonstrated as the results are based on chance.

5.4.6. Mixed duties – The Player/Coach

The OECD Model Commentary does not address this issue directly for sportspersons. However, in the context of "entertainers", the commentary provides that if the activities "are predominantly of a performing nature, the Article will apply to all the resulting income he derives in that State. If, however, the performing element is a negligible part of what he does in that State, the whole income will fall outside the Article. In other cases an apportionment would be necessary".[226] The exact extent of what constitutes "predominantly" appears to have been left to each State to decide. Clearly this could result in double taxation (or double non-taxation) depending on the ratio applied by the relevant State. Zoubek (2007: 46) demonstrates this issue with reference to the Austrian Ministry of Finance's guidelines in this regard, namely more than 80% is considered to be predominant (and hence all income falls within Article 17), between 20% and 80% apportionment would be required between the sportsperson article and the other DTA articles, but where the performance activity is less than 20%, all income should be taxed in terms of the other DTA articles. This appears a logical approach to the somewhat vague OECD Commentary.

It is submitted that the principle of dominant intention as applied to South African source (see 3.2.4.2) can be converted for successful application in the context of mixed duties of a sportsperson. The result would be the same consideration of apportionment as outlined above i.e. where a person is a player/coach performing in South Africa and the dominant performance is that of a player, the income would be considered in terms of the sportsperson article, whereas if neither activity is dominant, apportionment would be required.

5.4.7. Government sportspersons

The treatment of "government" sportspersons changed within the OECD Models. The 1977 OECD Model provided that income derived by a sportsperson as an employee of the government of one of the Contracting States was to be excluded from the scope of the sportsperson article and rather taxed in accordance with the division of rights in the

[225] Zoubek (2007: 43-44) agrees, but adds that: "such a view may be disputed if regular practice occurs in connection with such participation".

[226] 2008 OECD Commentary on Article 17 paragraph 4.

"Government Service" article. This position was changed on 21 September 1995 to include such persons within the ambit of the sportsperson article.

For those South African DTAs that include the "public funds" optional paragraph in the sportsperson article,[227] it is submitted that the change in the commentary has little impact (as such persons remain excluded from the scope of the sportsperson article). However, for DTAs concluded that were based on the 1977 OECD Model and that do not contain such an additional paragraph, it is submitted that unless a change with the original intention has been noted in an exchange of notes or a protocol has been added in this regard to the DTA, the former exclusion of such persons from the sportsperson paragraph must apply.[228] The difficulty that will be faced by the courts is the lack of evidence as to which DTAs were influenced by the 1995 change during the negotiation. If it is assumed that the 1995 change[229] had an immediate impact on the DTA negotiators and that changes were made up to the date of signing, there remains an interpretational difficulty in 11 South African DTAs.[230]

5.4.8. Conclusion and impact for South African DTAs

The term "athlete" refers only to physical skill and performance whereas the term "sportmen" and "sportsperson" can be extended to games of skill requiring training e.g. chess. While the commentary that has developed in the various model commentaries has generally clarified the position, it advocates a broad interpretation of both terms. It is therefore submitted that the persons covered by the sportsperson paragraph is consistent across all South African DTAs, irrespective of the date of conclusion of the DTA.[231] Even where persons may fall outside of the term "athlete", such persons could be included under the term "entertainer".

However, it is submitted further that the sportspersons article is too narrow in focus, being limited only to the participants of the sport and not the equally mobile support staff (e.g.

[227] 35 of the 69 DTAs examined (some in force and others signed but not yet in force) have the optional paragraph in some form (refer to 5.7.1 below).

[228] See chapter 2 for the reliance on the OECD Commentary existing at the time of entering into the DTA.

[229] "The 1995 Update to the Model Tax Convention", adopted by the Council of the OECD on 21 September 1995.

[230] Refer to Appendix F with reference to the DTAs with Israel, France, Poland, Romania, Taiwan, Hungary, Belgium, Sweden, Finland, Denmark and Korea.

[231] While there is consistency between the model conventions and the South African income tax law, other countries may apply a different definition domestically. This could lead to a dispute as to whether South Africa (as the country of source) has the right to tax the income (see Sandler, 2008: 236).

coaches). In addition, the sportsperson article is further limited in scope to only public performance related income, e.g. payments for training performed in South Africa but without public performance would fall outside the scope of the article. Such narrow interpretation would, it is submitted, have to be accepted by the South African courts on the customary law principle of good faith (see 5.3 above) for DTA interpretation purposes. The submission is accepted for the discussions that follow in this chapter.

The overly narrow focus of the terms "athlete", "sportsmen" or "sportsperson" in the DTAs results in such persons forming a subset of the persons contemplated within the withholding tax regime in terms of the South African ITA.[232] While such persons may fall within both the sportsperson paragraph and the withholding tax regime, the same is not necessarily true for all of their South African source income streams (see below).

Persons outside the scope of the sportsperson paragraph (e.g. sportspersons only training in South Africa without public performance or coaches) remain subject to the South African withholding tax.[233] Exclusion from the sportsperson paragraph allows the application of the other distributive rules in the DTAs. Such excluded persons should be subject to tax only in their state of residence as a result of the application of the Income from Employment article (paragraph 2 of Article 15), or if independent contractors, from the Business Profits article if the person does not have a permanent establishment in South Africa. Where a withholding has been made and remitted to SARS and a DTA exclusion provision applies, the taxpayer may follow the refund procedures available in the ITA.[234]

For persons outside of the scope of the withholding tax regime, income earned for performance in South Africa would be from a South African source. Relief from normal tax could be found in the Income from Employment article (paragraph 2 of Article 15), or if independent, from the Business Profits article if the person does not have a permanent establishment in South Africa. However, such persons will experience greater administrative difficulties. The South African ITA requires such persons to register as taxpayers[235] and

[232] See section 47A of the ITA and refer to 3.2.2.

[233] Note that "specified activity" for the purposes of the domestic legislation does not contain the implicit necessity for public performance that the DTAs require. Refer 3.2.3 and 5.4.2 above.

[234] The "General Provisions" in Chapter III of the ITA apply to the withholding tax on sportsperson *mutatis mutandis*.

[235] Meyerowitz (2008: 32-7)

submit a normal tax return. On submission of the return, the application by the taxpayer of the relief granted in terms of the DTA will be evaluated[236] and either accepted (and assessed as such) or rejected (in which case an assessment for normal tax on the basis of the source of income being South Africa will be made).

The misalignment of the scope of the sportsperson paragraph with the scope of the South African withholding tax (both as regards person contemplated and income streams) may be an unintended consequence. If so, this critical oversight should be corrected either by legislative amendment or through the issue of an interpretation note detailing the SARS practice. Interpretation notes are, however, not an ideal remedy should the South African courts decide that the ordinary meaning of the words used differ from a SARS interpretation[237] (or the Commissioner decides to deviate from his own practice[238]). Effect would be given to the ordinary meaning.

As the South African ITA has previously made reference to the OECD Model for definition purposes (see the definition of "permanent establishment" in section 1 of the ITA), perhaps reference to the OECD Commentary (as amended from time to time) would serve to correct the scope of the withholding tax to match that of the DTAs.

5.5. INCOME SUBJECT TO THE "SPORTSPERSON PARAGRAPH"

5.5.1. Income linked to the sportsperson

"Given the supposed problems that artistes and sportsmen pose for tax regimes, it is surprising that Article 17 is limited in terms of the income that it covers" (Sandler, 2008: 225).[239]

[236] Section 108(5) provides an override of the secrecy provisions for SARS to obtain the necessary information to evaluate whether relief should be granted.

[237] See *ITC 1572* (1993) 56 SATC 175 at 186 in which it was stated: "Departmental practice is not necessarily, of course, an indication of what the law means. However, it seems to me that the departmental practice is a very sensible approach to what should be done in this type of case. Plainly the procedure and the practice laid down by the Commissioner in that regard, is, if nothing else, commercial wisdom and good sense".

[238] See *ITC 1675* 62 SATC 219 at 228-229

[239] This comment is made in the context of types of income, not whether the tax should be levied on a net or gross basis (see 5.3.2 above).

The sportsperson paragraph provides the source State with the right to tax where the sportsperson (resident in another Contracting State) has derived income "from his personal activities as such exercised" in the source State.

The use of the phase "from his personal activities as such" creates a causal link between the athletes' performance and the income thereby generated.[240] This causal link immediately excludes those incomes unrelated to the public performance (see 5.4.2) of the sporting activity (for example, owning a restaurant in the State of source).

Further, and more critically, the causal link also excludes those incomes that are not sufficiently close (or linked) to the selected performance in the State of source. Such incomes excluded are likely to be taxed in the State of residence.[241] Vogel (1997) supports this view where he states: "The income of artistes and sportsmen will be subjected to taxation in the residence State (subject to other DTC distributive rules) if the specific factual requirements for the application of Art.17 are not met […] This will normally be the case if their income is neither directly nor indirectly connected with an actual public performance".[242] It is submitted that some indirect income could still be considered to have a causal link to the sporting activities.

The South African withholding tax on sportspersons provides that the tax is levied on sportspersons "in respect of" their specified activities (see 3.2.3). It is submitted that the use of "from" in the DTA article is more limiting than "in respect of" as used in the domestic context (see discussion in 3.2.4.3). The phrase "in respect of"[243] can imply a more indirect

[240] In addition, Zoubek (2007: 49) correctly makes the point that the necessity for the sportsperson to exercise the activities personally is illustrated by the example of jockeys versus racehorse owners. The racehorse owners would not be included in the sportsperson article as the earnings are as a result of the racehorse winning and not personal activity on their part. The jockey by contrast personally exercises the skill and sporting performance and thereby such jockey's earnings fall within the scope of the sportsperson article.

[241] As a result of short stays or a lack of permanent establishment in the source State (see Articles 15 and 7 of the OECD Model).

[242] Vogel (1997: 971-2). Betten (2006: 234) discussing commentary of the Advocate General (Netherlands) refers to an example of a racing driver whose contract salary covered test drives (not public) and races (in public). The view of the German court (from which this example was drawn) concluded that only the races were to be considered in Article 17 (the former being considered in terms of Article 15).

[243] "in respect of" is considered to mean "[w]ith reference to; as relates to or regards" whereas "from" is considered to mean "[d]enoting derivation, source, descent, or the like" or "[i]ndicating the place, quarter, etc.

link than the term "from". It is clear that the income referred to in the sportsperson paragraph links directly to the sportsperson's activities i.e. from only the sporting performance (see below) whereas the phrase "in respect of" (i.e. "linked to" the sporting performance could include such income as fees paid to a management company of a sportsperson – see 5.6 below)[244] and could have provided a wider base of income to consider (even those incomes with a looser connection to the sporting performance). It should be noted that the entity paragraph (see 5.6 below) uses the phrase "in respect of" (see 5.6.2 below for further detail on this phrase and its usage in that paragraph).

The phrase "personal activities" is a clear indication that the sportsperson paragraph can only apply to individuals and not other types of person (for example, a company).[245] It is submitted that this interpretation is correct both prior and subsequent to the OECD Commentary amendments concerning indirect payments (e.g. a salary earned by a sportsperson as part of the incorporated team receiving the fee for the team's performance) as it matters not by whom the sportsperson is paid, but rather that the income earned by the sportsperson pertained to the personal activity exercised in the State of source.[246] The OECD Commentary continues, expressing that where countries apply "look-through" principles in their domestic law, the sportsperson paragraph (and "personal activities") can apply.

A clear distinction must be made between indirect payments to a sportsperson and "look-through" effects. A "look-through" implies that the legal entity is disregarded and the

whence something comes". See "from, *prep. (adv., conj.)*" and "respect (*v*)" in Oxford English Dictionary Online. 2nd ed. 1989. Oxford: Oxford University Press.

[244] Refer also to paragraph 11 of the 2008 OECD Commentary on article 17 as regards the entity paragraph.

[245] Vogel (1997: 974) supports this view with reference to DTAs prior to 1992.

[246] 2008 OECD Model, paragraph 8 of the commentary to the sportsperson article provides that: "Paragraph 1 [the sportsperson paragraph] applies to income derived directly and indirectly by an individual artiste or sportsman. In some cases the income will not be paid directly to the individual or his impresario or agent. For instance, a member of an orchestra may be paid a salary rather than receive payment for each separate performance: a Contracting State where a performance takes place is entitled, under paragraph 1, to tax the proportion of the musician's salary which corresponds to such a performance. Similarly, where an artiste or sportsman is employed by e.g. a one person company, the State where the performance takes place may tax an appropriate proportion of any remuneration paid to the individual. *In addition, where its domestic laws 'look through' such entities and treat the income as accruing directly to the individual, paragraph 1 enables that State to tax income derived from appearances in its territory and accruing in the entity for the individual's benefit, even if the income is not actually paid as remuneration to the individual*" (*emphasis added*).

sportsperson is taxed as if the income accrued directly to him or her.[247] Indirect payments could occur where, for example, an incorporated team receives payment for the performance of the sportspersons. As the incorporated entity did not personally perform the activity, the entity (assuming no "look-through" application) is not taxed in terms of the sportsperson paragraph. The team members (the sportspersons) are taxed on the amounts indirectly received for the performance in the source State e.g. a proportion of the salary received.[248]

Certainly from a South African position, it is submitted that the OECD Commentary inserted concerning indirect payments (but not "look-through" payments) to sportspersons is a mere clarification of the position prior to 1992. The source rules do not specify by whom or when the payment must be made, merely that the income must arise from a South African source.[249]

Look-through does not apply in South African domestic law as pertains to source or the withholding tax on sportspersons.[250] It is submitted that the OECD Commentary pertaining to "look-through" holds no implications from a South African perspective. The sportsperson article does not specify by whom the payment must be made.[251]

5.5.2. Irrespective of employment or independent business

The earlier version of the sportsperson article provides an override to two other Model articles, namely the Dependent Personal Services and Independent Personal Services articles. The critical effect of the override is to guarantee taxing rights in the source State irrespective of the time spent in the source State (the Dependent Personal Services article) or whether the athlete has a "fixed base" in the source State (the Independent Personal Services article).

[247] The IBFD's International Tax Glossary (Larking, 2001: 222) defines "looking through" as: "Expression used informally in a number of tax contexts to indicate that the separate legal form of an entity is disregarded, the tax consequences impacting directly on the owners or participants […]". See also Juárez (2003: 409).

[248] While indirect income received by a sportsperson remains within the scope of the sportsperson paragraph, income, for example, retained in the legal entity would not, in the absence of the "look-through" paragraph (see 5.6 below for "entity paragraph" effects), be subject to the sportsperson paragraph.

[249] It is accepted that there are numerous practical difficulties in taxing such indirect payments, especially where such payments have passed through a legal entity and more particularly where such entity is situated in a third State (see 5.6.2.6 for triangular situations).

[250] South Africa does not apply a "look-through" approach (see Olivier *et al,* 2008: 130).

[251] For support see, Olivier *et al* (2008: 131) referring to the Hoge Raad decision BNB 1984/33).

In the absence of such override, the effect would be that short stay earnings of sportspersons or earnings without a fixed base in the source State would be liable for taxation only in the residence State i.e. would be exempt from taxation in the source State in terms of the Dependent and Independent Personal Services articles.

Later models merged the Independent Personal Services article with the Business Profits article. It is submitted that the merger did not bring with it new meaning to the sportsperson paragraph as the intention for the merger of the articles was the clear overlap and no intended difference in treatment.[252] The personal exercise of the activity still carries the implication that the paragraph (from a South African perspective) only applies to individuals and where such individuals are independent sportspersons, lack of a permanent establishment does not prevent taxation in the source State. The taxation consequences for the independent sportsperson receiving income for his or her activities are still considered in terms of the sportsperson paragraph.

While the merger of the Independent Personal Services article with the Business Profits article appeared to have caused no difficulty, a significant number[253] of South African DTAs contain an override of the Business Profits, Dependent Personal Services and Independent Personal Services articles in the sportsperson *paragraph*. This is anomalous to both the OECD and UN Models. No stated reason has been provided for this treatment in any supporting documentation to the South African DTAs. However, nothing appears to turn specifically on this point and the override appears to have been introduced as a "catch-all" provision rather than for a specific purpose. No specific commentary is included in either South African explanatory memoranda accompanying the DTAs nor in the USA Technical Explanation to the USA – South Africa DTA.

[252] The 2000 OECD Model Commentary provides the reason for the deletion of the Independent Personal Services article, namely: "Article 14 was deleted from the Model Tax Convention on 29 April 2000 on the basis of the report entitled "Issues Related to Article 14 of the OECD Model Tax Convention" (adopted by the Committee on Fiscal Affairs on 27 January 2000 and reproduced in Volume II at page R(16)-1). That decision reflected the fact that there were no intended differences between the concepts of permanent establishment, as used in Article 7, and fixed base, as used in Article 14, or between how profits were computed and tax was calculated according to which Article 7 or 14 applied. In addition, it was not always clear which activities fell within Article 14 as opposed to Article 7. The effect of the deletion of Article 14 is that income derived from professional services or other activities of an independent character is now dealt with under Article 7 as business profits".

[253] 40 of 69 South African DTAs examined (included in that number are some DTAs not yet in force).

It is difficult to reconcile the override of the Business Profits article and the Income from Employment article in the context of the "benefit principle"[254] for the source State. The short stay of international performers would, under the other distributive articles such as Business Profits and Income from Employment, (generally) not result in taxation in the source State. Holmes (2007: 20) states that the benefit principle "implies that the non-resident taxpayer needs to have some sort of presence in [the] country in order to take advantage of the public goods and services offered by the government". It could be argued, for the top performers, that the increased levels of security and other infrastructure afforded them should result in some recovery for the government in the form of taxes. However, this is a weak defence of this principle. It appears rather that the override stems not from the benefit principle, but from concerns of international tax evasion.[255]

5.5.3. Income subject to the sportsperson paragraph

Income derived from sporting activities can be grouped into three broad categories: those directly linked to a specific performance (e.g. an appearance fee for a particular tournament or match); those linked to a sporting performance but not necessarily a specific performance (e.g. a salary earned by a sportsperson) and those loosely related to or associated with a sporting activity either generally or indirectly (e.g. general sponsorships, advertising and promotional fees). Only some of these incomes fall within the scope of the sportsperson paragraph.

5.5.3.1. Direct causal link to specific performance

Where a clear direct link exists between the income and the specific performance, such income falls within the scope of the sportsperson paragraph. The contractual arrangements (to reflect the direct link) are also (generally) expressed with clear reference to the particular sporting performance. In addition, payments to sportspersons, via intermediaries, for specific

[254] The "benefit principle" is defined as the "[p]rinicple that taxes should be levied in accordance with the use made or benefits received from government goods and services" (Larking, 2001: 35-36).

[255] See the 1987 OECD Report (paragraph 7) in which it is indicated that: "Sophisticated tax avoidance schemes, many involving the use of tax havens, are frequently employed by top-ranking artistes and athletes. Whilst some countries do not consider such activities of major importance, given the limited number of persons involved in international activities of this sort and the relatively small amounts of revenue involved, there is general agreement that where a category of – usually well-known – taxpayers can avoid paying taxes this is harmful to the general tax climate, which justifies coordinated action between countries".

performance are also contemplated within this category (i.e. indirect payments to sportspersons with a direct causal link between the amount received and the performance provided falls within the sportsperson paragraph).

5.5.3.2. Causal link but not to specific performance

The second category of income retains the causal link with the sporting activities, albeit not to any specific performance, for example salaries for the worldwide sporting performances, but not attaching to specific performances. There is congruence in apportioning such incomes and the application of South African domestic law. For income such as salaries for worldwide sporting performance, the dominant cause of the income would be the service rendered / sporting performance. This would result in apportionment to allocate so much of the salary as pertains to the South African sporting performance.[256] There has been some extensive debate as to whether basic salaries are subject to the sportsperson article at all. The prevalence in the international literature is that the basic amount does fall within the sportsperson article (Betten, 2006: 235). It is submitted that such amounts also fall within the scope of the South African DTA articles on sportspersons.

The particular mechanics of the split would be left to the courts in the event of a dispute, however, Vogel (1997) suggests that the apportionment should be based on the "volume of activities exercised in each State".[257] He provides further that "the count made in this connection must extend to cover proportionately […] practice sessions, time spent in training camps, etc. […].[258] The source State is also entitled to tax work-days on which [a sportsperson] merely had to be ready to work if called. However, work-free days are not to be so included, such as weekends or holidays".[259] It is submitted that this is the correct

[256] Apportionment is also supported in the 2008 OECD Commentary (at paragraph 8) since specific reference was inserted in 1992 following the 1987 OECD Report (at paragraph 76).

[257] Vogel (1997: 980) using the 1984 USA Tax Court decision of *Linsemann v Comm.* (82 Tax Court 514) as support.

[258] Vogel (1997: 980) referring to the 1982 USA decision of *Stemkowski v Comm.* (690 F. 2d 46) Court of Appeals (2nd Circuit). Betten (2006: 235) goes further with regard to training days distinguishing between (i) days not for the public and not related to specific performance in the source State and (ii) days related directly to the performance in the source State. Only those days in item (ii) should fall within the scope of Article 17.

[259] Vogel (1997: 980) using a California Court of Appeals decision *Newman v Franchise Tax Bd* 208 Cal. App. 3rd 972 (1989) as support.

approach for a South African court as well.[260] The so-called "work-free" days may differ between sports.

There are clear practical difficulties in applying such apportionment, particularly where a sportsperson earns only a salary and may only perform once in the source State (and thereby adding an unnecessary level of complexity to the simple salaried sportsperson's affairs). The OECD Model, since 1963, has recognised the potential short-coming of the sportsperson article and provides that the states negotiating the DTA can limit the application of the sportsperson article by removing the override of the Income from Employment article (previously the Dependent Personal Services article).[261] Such application has the result that the "salaried" sportsperson is taxable only in the residence State, unless the sportsperson fails the exemption test[262] in the Income from Employment article. None of South African DTAs limits the sportsperson article in this way.

[260] The method of apportionment can vary dramatically. Sandler (2008: 228 (fn31)) provides the following example: "Take the ranking bonus as an example. One allocation method may be based on the 'points' earned with respect to a tournament in a particular country compared to aggregate points earned in the year. The ATP has an elaborate points system for determining rank based on the level of the tournament and the final round that the player achieved (plus additional ranking points for winning the event and for qualifying for the event): see the ATP's Rule Book, part VIII, available at <www.atptennis.com/en/players/ATP_Rulebook2007.pdf>. Another reasonable allocation could be based on tournament winnings compared to total winnings. Finally, it is arguable that all tournament play contributes toward an individual's ultimate ranking and therefore allocation should be based on the number of days (or tournament days) that the individual spends playing tennis in each country".

[261] The 1963 OECD Commentary recognised the impact of the overriding nature of the sportsperson article, providing: "the States concerned may, by common agreement, limit the application of Article 17 [the sportsperson article] to independent activities by adding its provisions to those of Article 14 [Dependent Personal Services] relating to professional services and other independent activities of a similar character. In such case, public entertainers and athletes performing for a salary or wages would automatically come within Article 15 [Independent Personal Services] and thus be entitled to the exemptions provided for in paragraph 2 of that Article". This principle has been retained in the later OECD Model Commentaries by referring to the Business Profits article instead of the Independent Personal Services article and to the Income from Employment article instead of the Dependent Personal Services article.

[262] The "exemption test" refers to the exemption from taxation in the source State for short stays contained in the Income from Employment article.

5.5.3.3. No direct link to specific performances (world-spanning contracts)

The third category creates the greatest difficulty in identifying whether the sportsperson article or another distributive article applies. The contractual arrangements and subsequent activities[263] are critical to the correct DTA article being applied. The general rule provided in the 1987 OECD Report provides that: "Articles other than Article 17 [the sportsperson article] would apply whenever there were no direct link between the income and a public exhibition by the performer in the country concerned. On the contrary, advertising or sponsoring income paid, especially in connection with a performance (whether before or after the event) or a series of performances, would fall under Article 17".[264]

The principle derived from the 1987 OECD Report was carried into the 2000 OECD Model (and subsequent OECD Models).[265] The 2008 OECD Commentary (identical to the commentary introduced in 2000[266]) provides:

> "Besides fees for their actual appearances, artistes and sportsmen often receive income in the form of royalties or of sponsorship or advertising fees. In general, other Articles would apply whenever there was no direct link between the income and a public exhibition by the performer in the country concerned. Royalties for intellectual property rights will normally be covered by Article 12 [Royalties] rather than Article 17 (cf. paragraph 18 of the Commentary on Article 12), but in general advertising and sponsorship fees will fall outside the scope of Article 12. Article 17 will apply to advertising or sponsorship income, etc. which is related directly or indirectly to performances or appearances in a given State. Similar income which could not be attributed to such performances or appearances would fall under the standard rules of Article 7 or Article 15, as appropriate. Payments received in the event of the cancellation of a performance are also outside the scope of Article 17, and fall under Articles 7 [Business Profits] or 15 [Income from Employment], as the case may be".[267]

It is clear throughout the development of the sportsperson article that income not directly or indirectly linked to the performance of the sportsperson is excluded from the scope of the

[263] It is submitted that where the legal form of the agreement differs from the actual performance (i.e. the substance is different from the legal form), the substance (at least in South Africa) would prevail in identifying the appropriate DTA article.

[264] 1987 OECD Report at paragraph 83. See also the example provided by Sandler (2008: 228-229).

[265] Introduced in the amendments made to the OECD Model on 23 July 1992.

[266] In which the references to "Article 14" [Independent Personal Services] were deleted.

[267] 2008 OECD Commentary paragraph 9

article.[268] The second sentence of the above OECD Commentary therefore states the position as it has always been (and as is the current position).

The OECD Commentary (above) indicates that "[r]oyalties for intellectual property rights will normally be covered by Article 12 [Royalties] rather than Article 17". The 1987 OECD Report indicates that countries should "check that what was described as a royalty by the taxpayer really was a royalty in the meaning of Article 12: if it were not, then Article 17 might apply".[269] There is therefore an indirect override where the substance of the income is different to the legal form. If the income is not a true royalty, default is to the sportsperson article where there is a direct or an indirect link to the performance of the sportsperson. There is evidence of this analysis already in South African case law.[270]

5.5.3.4. Application of classification of income

By classifying such incomes as falling within the scope of the sportsperson paragraph, taxing rights are provided to the source State. While it is submitted that this is correct based on the principles of source (see 3.2.4.2 and 3.2.5), the practicality of application in all situations is in doubt. It is unlikely, particularly for general advertising and sponsorship contracts signed in other countries and pertaining to the sportspersons worldwide appearances,[271] that the source State will be notified of such agreements or be able to determine a practical basis of apportionment[272] to apply (correctly) the sportsperson article.[273] Although the scope of

[268] Sandler (2008: 226) agrees with the limitation in scope (although questions why such a limited focus article exists) stating: "[C]haracterization problems can arise where the name, likeness, or signature of an artiste or sportsman is attached to a particular product. If the individual helps design the product, then arguably a portion of the amount paid is for personal services, which are not within the scope of Article 17. Where the payment is for the use of the name, signature or likeness alone, it is similarly doubtful whether the payment would fall within the scope of Article 17; even if the payment may be considered a payment for personal services, which is doubtful, it is unlikely that the payment would be for personal services as an artiste or sportsman". Refer also to 3.2.5.6 for *ITC 1735* and the reclassification of royalties to income from personal services (and to which the sportsperson article was applied).

[269] 1987 OECD Report paragraph 82

[270] See *ITC 1735* in which income that had been classified as "intellectual property" (and thereby a "royalty") in a contract was found to be fees for promotion of the competition.

[271] Note that the general agreement must create a direct or indirect link to the performance in the source State. If no link exists and the amount cannot be classified as a royalty, recourse is to the other distributive articles of the relevant DTA.

[272] Vogel (1997: 972) suggests that apportionment can only take place where "payment [has] been calculated exclusively for a sporting event; the source State may not divide a payment which the contracting parties

Article 17 does extend to payments related to the public performance of the sport, it seems impractical for the source state to collect the tax on such amounts. Where the endorsement payment is linked to the specific performance, the source state may be better positioned to tax the payment.[274]

In addition, this application appears to contradict the original purpose of the sportsperson article, namely that providing taxing rights to the source State will ensure that sportspersons do not evade taxation through non-disclosure about performances in the source State (see 5.2.1 above). It is more likely that the residence State would have greater access to information concerning these world spanning contracts than the source State and would have a practical advantage when taxing the income derived from such contracts.

5.5.3.5. Specific income exclusions

Following the requirement to provide source States with the right to tax indirect incomes of sportspersons, such as general advertising or sponsorship contracts, the OECD Commentary (above) then provides that cancellation fees do not fall within the scope of the sportsperson article. It is submitted that a stronger connection to the performance (or potential performance) exists in the event of a cancellation payment than indirect earnings in respect of a general advertising or sponsorship contract. Vogel (1997) provides that this (OECD) approach "fails to consider that the […] sportsman receives such payments because his claim to such compensation arose from the initial contractual relationship in his capacity as […] sportsman. The compensation therefore follows from the […] sporting activity. […] If the compensatory payments are received due to a concrete performance and a direct or indirect connection exists, Art. 17 becomes relevant".[275] However, the necessity of public performance, it is submitted, is the cause for the exclusion of the cancellation payment. In addition, as the activity was not "exercised" in the source State, the payment for cancellation of the public performance does not fall within the sportsperson article. Therefore, despite

themselves did not divide, merely for the purpose of allowing Art. 17 MC to apply". Sandler (2008: 229) agrees with this view however adds that countries may introduce specific deeming provisions for selected amounts (Canada being an example as regards certain signing bonuses).

[273] This difficulty was identified and documented in the 1987 OECD Report (at paragraph 81).

[274] Sandler (2008: 227) refers to the United Kingdom case (likely to be of persuasive value in the South African courts) of *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL 23 in which endorsement payments made to the sportsman were linked to his public performances.

[275] Vogel (1997: 980)

arguments that the cancellation payment "replaces" the income that would have been earned from the performance and therefore should be taxed on the same basis,[276] it is submitted that the absence of such performance actually being exercised in the source State prevents the application of the sportsperson article to such payments. As a result of the need for the activity to be "exercised" in the source State, it is submitted that it does not matter from which State the cancellation payment is sourced.

5.5.3.6. Apportioning "mixed" income

The final issue of apportionment to address is that of the "player-coach" type arrangement i.e. where the sportsperson performs a dual role of participant in the sport and support staff. Vogel (1997) suggests that where the amount paid is undivided by the contracting parties "taxation is geared to the predominant part of the activity performed in the State of its exercise. Depending on this predominant part, either the State of performance or the State of residence taxes the respective income fully".[277] It is submitted that the same principle would be applied in South Africa (see reference to dominant source in 3.2.4.2 above), for example where 20 per cent of the activity pertains to coaching and 80 per cent to participating in the sport and a fee is paid for 10 matches, 6 of which are in the source State, six-tenths of the fee may be taxed in the source State in terms of the sportsperson article. Where the parties contractually identify the two activities and separate fees are payable for each, with similar facts to the example above, six-tenths of the fee for the sporting performance only may be taxed in terms of the sportsperson article.[278] The fee for coaching is considered in terms of the other distributive rules of the DTA.

5.5.3.7. UN and USA Model deviations from the OECD Model

The UN Models of 1980 and 2001 follow the approach of the OECD Model. The USA Models,[279] however, deviate in certain respects, but not materially. Deviations include a *de minimus* rule.[280] In terms of this rule, sportspersons with receipts (including reimbursive expenditure) of less than $20,000 in the particular year of assessment are not subject to the

[276] See Danis (2007: 95) referring opinions of other authors.

[277] Vogel (1997: 976)

[278] See also Vogel (1997: 976)

[279] Note that the 1996 and 2006 Model Commentaries are identical in principle.

[280] First paragraph under the heading "Paragraph 1" of the 2006 USA Model. The USA – South Africa DTA is the only South African DTA to contain a *de minimus* rule.

sportsperson paragraph (but remains subject to the other distributive rules of the DTA).[281] If the minimum is exceeded, all the qualifying receipts may be taxed in the source State in terms of the sportsperson paragraph.[282] Where payments are made in multiple years of assessment, each year of assessment is treated in isolation i.e. amounts are not aggregated for comparison against the $20,000.[283]

With regard to other types of income, the 2006 USA Model provides (on a basis similar to the OECD Model):

> "In determining whether income falls under Article 16 or another article, the controlling factor will be whether the income in question is predominantly attributable to the performance itself or to other activities or property rights. For instance, a fee paid to a performer for endorsement of a performance in which the performer will participate would be considered to be so closely associated with the performance itself that it normally would fall within Article 16. Similarly, a sponsorship fee paid by a business in return for the right to attach its name to the performance would be so closely associated with the performance that it would fall under Article 16 as well. As indicated in paragraph 9 of the Commentary to Article 17 of the OECD Model, however, a cancellation fee would not be considered to fall within Article 16 but would be dealt with under Article 7 (Business Profits) or 14 (Income from Employment)".[284]

In respect of dual role sportspersons, an approach similar to that discussion above in terms of the OECD Model is adopted, namely:

> "As indicated in paragraph 4 of the Commentary to Article 17 of the OECD Model, where an individual fulfills a dual role as performer and non-performer (such as a player-coach or an actor-director), but his role in one of the two capacities is negligible, the predominant character of the individual's activities should control the characterization of those activities. In other cases there should be an apportionment between the performance-related compensation and other compensation".[285]

5.5.3.8. Conclusion

It is clear from the above that the most significant issue is identifying the causal link with the income generated in the source State. The South African source rules (see 3.2.4.2) work similarly to the apportionment approach for world spanning incomes e.g. salaries paid to sportspersons for worldwide performance. However, any number of reasonable

[281] Third paragraph under the heading "Paragraph 1" of the 2006 USA Model

[282] First paragraph under the heading "Paragraph 1" of the 2006 USA Model

[283] Eighth paragraph under the heading "Paragraph 1" of the 2006 USA Model

[284] Sixth paragraph under the heading "Paragraph 1" of the 2006 USA Model

[285] Seventh paragraph under the heading "Paragraph 1" of the 2006 USA Model

apportionment mechanisms could be used. The South African legislation and the OECD Model do not specify a method of apportionment thus the courts should accept any reasonable method adopted by the sportsperson.

Certainly if no clear link is evident, such income is excluded from the scope of the sportsperson paragraph.

5.6. THE "ENTITY PARAGRAPH"

This section briefly discusses the entity paragraph from its introduction and its evolution. The interpretation in South Africa of the entity paragraph is also discussed. In addition, the reservations to the 2008 OECD Model are examined. Finally, the South African withholding tax regime for sportspersons is examined in the context of the entity paragraph.

The general effect of the entity paragraph is to provide the source State with the right to tax persons other than the sportsperson where such person receives income with a causal link to the personal activities of the sportsperson, irrespective of whether the sportsperson will ultimately receive such income and despite whether such entity has a permanent establishment in the source State.

This paragraph has a strong anti-avoidance purpose (see 5.6.1) although its use has been extended beyond such application (see 5.6.2).

Very few South African DTAs exclude the "entity paragraph", all of which predate the OECD insertion of the entity paragraph (1977).[286] This paragraph (2008 OECD Model) provides:

> "Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised".[287]

[286] Of the South African DTAs in force as at 1 June 2008 (conclusion dates in brackets), only Germany (1973), Israel (1978), Malawi (1971), the Netherlands (1971), Switzerland (1967) and Zimbabwe (1965) exclude the entity paragraph. In addition, the DTA with Zambia (1956) and the extension DTAs with Sierra Leone and Grenada (each 1960 and based on the United Kingdom 1946 DTA) do not have a sportsperson article and by default exclude the entity paragraph.

[287] Note that the UN Model contains the same wording, the only variations being (i) the use of the term "sportsperson" and not "sportsman" and (ii) reference to override of Independent Personal Services (as the UN

The 2006 USA Model provides similar wording but includes some subtle alterations:

> "Where income in respect of *activities* exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income, notwithstanding the provisions of Article 7 (Business Profits) or 14 (Income from Employment), may be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised *unless the contract pursuant to which the personal activities are performed allows that other person to designate the individual who is to perform the personal activities*" (*emphasis added*).[288]

5.6.1. Development of the OECD Model entity paragraph

5.6.1.1. The 1977 entity paragraph and purpose

The entity paragraph was introduced into the OECD Model in 1977. The evolution of the entity paragraph was extensively examined by Molenaar (2005a: 36-44). The wording originally introduced is nearly identical to the current wording of the paragraph.[289] As discussed in chapter 2, the OECD Commentary in circulation at the time the DTA was concluded should indicate the intention of the negotiators. Later commentary (where providing clarification or correction to a previous error) may also be used (refer 2.4.4 above).

The 1977 OECD Commentary provided the following as to the introduction of the entity paragraph:

> "The purpose of paragraph 2 is to counteract certain tax avoidance devices in cases where remuneration for the performance of an entertainer or athlete is not paid to the entertainer or athlete himself but to another person, e.g. a so-called artiste-company, in such a way that the income is taxed in the State where the activity is performed neither as personal service income to the entertainer or athlete nor as profits of the enterprise in the absence of a permanent establishment. Paragraph 2 permits the State in which the performance is given to impose a tax on the profits diverted from the income of the entertainer or athlete to the enterprise where for instance the entertainer or athlete has control over or rights to the income thus diverted or has obtained, or will obtain, some benefit directly or indirectly from that income. It may be, however, that the domestic laws of some States do not enable them to apply such a provision. Such States are free to agree to alternative solutions or to leave paragraph 2 out of their bilateral convention".

Model has retained this article whereas the OECD Model has merged this article with the Business Profits article).

[288] The differences between the OECD Model and the USA Model are examined in 5.6.1.3 below.

[289] The only deviations are the use of the term "athlete" (replaced with "sportsmen" in 1992) and the override reference to Article 14 (Independent Personal Services, which was collapsed into Article 7 as the principles were found to be the same). Refer 5.4 and 5.5.2 above for further information.

For countries like South Africa (that do not apply a "look-through" approach – see 5.5.2 above), the entity paragraph provided a taxing right to the source State overriding the Business Profits, Independent and Dependent Personal Services provisions. However, as is clear from the commentary, the entity paragraph's purpose was anti-avoidance for diverted income of sportspersons.

The anti-avoidance purpose for diverted income placed a strict limitation on the application of the entity paragraph. Other income received by the entity for the sportspersons performance, e.g. a sport agent company's commission on performances by its sportspersons, remained outside the scope of the entity paragraph.

However, while this limitation was certainly the view of the OECD at the time, the ordinary meaning of the words (the primary interpretation tool used by the South African courts) clearly provides for income beyond the anti-avoidance purpose to be considered. In addition, the purpose between 1977 and 1992 will have little impact on DTAs in South Africa as all DTAs in South Africa containing the entity paragraph were concluded after the change to the OECD Commentary in 1992.

Some countries that have concluded DTAs with South Africa have specifically provided in the entity paragraph a limitation in scope to situations of avoidance of taxation (see 5.6.1.3 below).

5.6.1.2. Change in the OECD Commentary – 1992 and beyond

The change in the OECD Commentary in 1992 resulted in alignment of the commentary to the wording of the entity paragraph (i.e. gave the paragraph its full scope) (Vogel, 1997: 991). The OECD Commentary, in returning to the plain meaning of the words drafted has aligned with the interpretational rules used for fiscal legislation in South Africa (see 2.3 above). In addition, with the bulk of the South African DTAs concluded after the change in the OECD Commentary, it is submitted that the negotiators would have had such update in consideration when concluding the DTAs. Furthermore, as is evidenced in other DTAs concluded (see 5.6.1.3 below), Contracting States are free to change the wording to reflect any deviation from the Model.

The impact of the 1992 change to the OECD Commentary was an extension of the intended scope of the entity paragraph to provide the source State the right to tax any entity receiving

"income" as a result of a sporting performance in the source State by a sportsperson, the lack of a permanent establishment in such State notwithstanding. This was a deviation from the anti-avoidance purposes of 1977 (where income of sportspersons was being directed into legal entities to avoid the application of the sportsperson paragraph). However the text of the entity paragraph always provided for such a broad interpretation.

While ease of interpretation is facilitated in the alignment of the commentary with the wording used, such an "unlimited" approach to such a specific group of persons should require some justification. To contrast the position of an entity providing sportspersons for performance versus a labour broker providing other mobile workers, consider the following:

- a non-resident entity organises sportspersons to perform in specific events in South Africa for a South African organisation. The fee paid to the non-resident organisation falls to be taxed in South Africa in terms of the entity paragraph (despite the absence of a permanent establishment). The sportspersons would also be taxed in terms of the sportspersons paragraph for their performance in South Africa.
- A non-resident labour broker provides a South African client with persons to perform certain work. While the fee received for such persons work is gross income in South Africa the amount would not be taxed, as the labour broker does not have a permanent establishment in South Africa.[290]

These similar situations have different effects merely as a result of the type of person involved (sportsperson versus other mobile worker). Surely such differing treatment of sportsperson entities versus others should have strong justification.

While a dramatic distinction is made between sportspersons and other (equally) mobile workers, the justification for the expansion of the scope of the entity paragraph to all interposed entities for sportspersons (beyond an avoidance or combating of evasion basis) is thin. The 1987 OECD Report provides weak argument for the expansion of the intended scope of the entity paragraph. Specifically it provided:

> "89. The Committee found that there was nothing in the text of paragraph 2 [the entity paragraph] to preclude its application to incorporated teams, troupes, etc., even though the original intention was different. It was therefore agreed that the provisions in Article 17 enables tax to be levied on:
> - The amounts paid to artistes or athletes through a separate entity but accruing to them [the original purpose];

[290] See Binding Private Ruling BPR 007 - Service Fees Received by a Non-Resident Labour Broker. Available at: http://www.sars.gov.za/home.asp?pid=4265#BPR007.pdf

> - The amounts allocated to an entity, but not paid to the artiste or athlete, which has the effect of indirectly taxing the profit element kept by the entity.
>
> […]
>
> 91. The Committee noted that the legislation of some countries makes it possible to "look through" arrangements involving entities and to deem the income to be derived by the artiste or athlete: where this is so, paragraph 1 [the sportsperson paragraph] enables them to tax income resulting from such activities in their territory. Other countries cannot do this. Where a performance takes place in such a country, paragraph 2 permits such countries to impose tax on the profits directed from the income of the artiste or athlete to the entity. It may be, however, that the domestic laws of some countries do not enable them to apply such a provision. Such countries are free to agree to alternative solutions or to leave paragraph 2 out of their bilateral conventions […].
>
> 92. Having earlier considered the application of paragraph 2 to payments made to an entity in respect of artistes' and athletes' performances where they do not control the entity or benefit from that income (see paragraphs 89 and 91 above), the Committee agreed that there were even stronger reasons for allowing the country of source to tax the whole of the income paid to a performer's own entity. […]"

Having specified that the Committee had even stronger reasons for extending the scope, little was done to express such reasoning. It is submitted that paragraphs 89 and 91 provide little support for such expansion. In addition, paragraph 91 provides that "paragraph 2 permits such countries [those without "look through"] to impose tax on the *profits directed from the income of the artiste or athlete* to the entity". Surely such income "directed" refers to an anti-avoidance purpose. However, where such sportspersons do not participate either directly or indirectly in such profit, no clear anti-avoidance purpose is evident.

It is submitted that weak justification exists to extend the application of the entity paragraph from an OECD perspective. In addition, that some countries do not have a look through approach should not influence the development of the Model DTA. It is submitted that it is not for a Model DTA to provide for the shortcomings of some countries domestic legislation. In particular, countries have ample opportunity to legislate against shortcomings in their legislation, whereas DTAs are designed to last for a long period of time. Such purpose of a Model DTA should not be clouded with correction for specific domestic law issues.

Despite such weak justification, it is clear that the ordinary meaning for the purposes of South African fiscal interpretation (and now the OECD Commentary) provides the source State with a broad right to tax. However, the sportsperson article, including the entity paragraph, was introduced to avoid "practical difficulties" (see 5.2.1). It is submitted that recent changes to the OECD Model and existing domestic legislation in South Africa may negate the need for the sportsperson article (see chapter 6) as these practical difficulties (generally the difficulty

for the residence State to obtain information concerning the activities of the sportsperson) may be more easily overcome.

5.6.1.3. Other approaches to the entity paragraph

Following the change in the OECD Commentary in 1992 (see 5.1.6.2 above), the United States, Canada and Switzerland entered reservations in the OECD Commentaries as to the application of the entity paragraph for purposes other than anti-avoidance. The South African DTAs with the United States and Canada both carry limitations of scope. The DTA with Switzerland (1967) currently in force predates the introduction of the entity paragraph. Only the 1963 version of the sportsperson article is found in this DTA.

The DTA with the United States (1997) provides:

> "Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 (Business profits), 14 (Independent personal services) and 15 (Dependent personal services), be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised, *unless it is established that neither the entertainer or sportsman nor persons related to such entertainer or sportsman participate directly or indirectly in the profits of that other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions or other distributions*" (*emphasis added*).

It should be noted that the primary position is the same as the OECD Model. The onus is clearly on the taxpayer to provide proof that the sportsperson will not benefit in some form from the amounts accruing to the entity.

Similarly, the DTA with Canada (1995) provides:

> "2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised.
>
> 3. *The provisions of paragraph 2 shall not apply if it is established that neither the entertainer or the sportsman nor persons related thereto, participate directly or indirectly in the profits of the person referred to in that paragraph*" (*emphasis added*).

All of the other South African DTAs follow the purpose as discussed in 5.6.1.2 above.

The impact of such stated intentions in the DTAs limits the scope (using the South African interpretational tools of examining the plain meaning of the words) to circumstances of abuse

/ avoidance. Therefore where the sportsperson is merely an employed performer not benefiting from the profits of the employer, the fee received by the employing entity (albeit related to the personal activities of the sportsperson in the source State) will not be taxed unless a permanent establishment is found to exist. Many of the Canadian DTAs have wording similar to that entered into with South Africa.

Subsequent to the entry into force of the USA DTA with South Africa, the USA has issued a revised model (2006). The earlier USA Model (1996) limitation (as in the DTA with South Africa) provides that the entity paragraph shall not apply where: "it is established that neither the entertainer or sportsman nor persons related to such entertainer or sportsman participate directly or indirectly in the profits of that other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions or other distributions". This limitation has been reworded in the USA Model (2006) to provide that the entity paragraph will not apply where: "the contract pursuant to which the personal activities are performed allows that other person to designate the individual who is to perform the personal activities". This appears a significant shift from the earlier position, yet the USA has not revised their reservation to the OECD Model.

In the Technical Explanation accompanying the models, it appears that the amendment to the Model was driven by a need to align the provision with US domestic law. In addition, the 2006 USA Model Technical Explanation document still makes it clear that "[f]or [the] purposes of paragraph 2, income is deemed to accrue to another person (i.e., the person providing the services of the performer) if that other person has control over, or the right to receive, gross income in respect of the services of the performer". Despite the alteration in text and the seemingly broader scope of the USA Model clause, the stated purpose has remained the same.

The amendment between the 1996 and 2006 USA Models clearly illustrates the ability of Contracting States to conclude articles different to that of the OECD and with meaning different to that of the OECD Commentary. This supports the position in 5.6.1.2 above (and in chapter 6) for equality of treatment for mobile workers (be they sportspersons or other).

5.6.2. Application of the entity paragraph

5.6.2.1. Income subject to the entity paragraph

The entity paragraph clearly provides that only that "income *in respect of* personal activities exercised" (*emphasis added*) as accrues to the entity is considered within the scope of the provision. South African courts would interpret the phrase "in respect of" in the context in which it appears.[291] It is submitted that the context links the income to the personal activity of the sportsperson. As a result, only the income contemplated for the purposes of the sportsperson paragraph may be contemplated within the scope of the entity paragraph.

Such limitation to the income as contemplated in the sportsperson paragraph is further clarified in the phrase "in his capacity as such", clearly linking to the entity only that income as arises from the public performances of the sportsperson (refer 5.4.2 and 5.5.1 above).[292]

5.6.2.2. The meaning of "accrue"

The entity paragraph requires that the income must "accrue" to the entity. South Africa courts would apply the ordinary meaning of the term "accrue" in its context. "Accrue" in South African tax law means to be "unconditionally entitled" to the income (see 3.2.4.1 above). It is submitted that such application yields the best result for the interpretation of the DTA as opposed to an interpretation of the amount as meaning "cash flow" or "profit determination".[293] Such an interpretation also prevents the receipt by a sports agent on behalf of a sportsperson as being considered to have "accrued" to the agent. As the agent is not unconditionally entitled to the amount, no accrual has taken place.

5.6.2.3. Gross amounts or net amounts for the "entity"

A practical difficulty arises when considering whether the entity should be taxed on a gross or net basis. The OECD Commentary to the sportsperson article specifically leaves the issue to

[291] *ITC 1340* (1980) 43 SATC 210 at 212-213 refers to the judgment of Schreiner JA in *Rabinowitz and another v De Beer's Consolidated Mines Ltd and another* in which Schreiner JA states: "Expressions like 'in respect of' and 'in connection with', though they may sometimes be used to cover a wide range of association, must in other cases be limited to the close or more direct forms of association indicated by the context".

[292] Vogel (1993: 990) appears to agree, stating that the entity paragraph is an extension of the sportsperson paragraph, implying that the income scope remains the same, the change is merely in the person to be taxed.

[293] It is submitted that Felderer (2007: 277-278) agrees while not expressly using the South African phrase "unconditionally entitled". Rather Felderer refers to the contractual relationship receiving priority.

be decided by the domestic law of the contracting state.[294] Gross taxation levied on the entity for amounts received in respect of a sportsperson's personal activities and again levied on amounts received by the sportsperson from such entity would result in economic double taxation (and not juridical double taxation). The OECD Commentary attempts to address this issue in paragraph 11, stating that: "paragraph 2 provides that the portion of income *which cannot be taxed in the hands of the performer* may be taxed in the hands of the person receiving the remuneration". This implies that where a total performance fee is derived, some of which is paid to the sportsperson and some of which is paid to the entity, the tax to be levied is effectively split between the sportsperson and the entity. It should be noted that the wording of the entity paragraph itself does not indicate such an approach.

The South African ITA applies the withholding tax on sportspersons and other persons on a gross basis. Unlike the OECD Commentary, the legislation permits the full amount received by or accruing to the entity to be subject to the withholding and again when an amount is paid from the entity to the sportsperson. This can result in a higher effective tax rate where amounts are paid to sportspersons via entities.[295]

For example, R1 million is paid for a sports team's public performance (payable to an entity). Such entity on-pays R400 000 to the sportspersons as salaries. Based on the wording in the South African ITA, 15% is levied on the R1 000 000 paid to the entity (the amount can be said to have accrued to the entity) and a further 15% on the R400 000 on the payment to the sportspersons. This example does assume that the salary (R400 000) being paid to the sportsperson can be allocated to the particular performance. In such a case, withholding taxes of R210 000 (R1 000 000 x 15% + R400 000 x 15%) have been levied resulting in an effective tax rate of 21% on the gross proceeds. Assuming that expenses in the entity account for 20% of the proceeds (excluding the payment to the sportspersons), the entity has made a profit of R400 000. At an assumed 30% tax rate in the residence State, the tax levied on the entity is R120 000. However R150 000 (R1 000 000 x 15%) in taxes were withheld from the entity in the source State. The R30 000 is unlikely to be recovered from the residence State (being limited to the tax levied in that state).

[294] Paragraph 10 of the 2008 OECD Commentary on article 17.

[295] In light of the approach of the United States to limit the application of the DTA with South Africa to situations of abuse or avoidance, the Technical Explanation to the DTA provides: "The income taxable by virtue of paragraph 2 is reduced to the extent of salary payments to the performer, which fall under paragraph 1".

If the agreements had stipulated that 40 per cent of the proceeds were to be paid to the sportspersons for that performance and the entity merely acted as the collection agent, then 15% would be levied on the R600 000 received by the entity (as the entity was only unconditionally entitled to such amount) and a further 15% levied on the amount received by the sportspersons. Despite being a tax on gross amounts, such (correct) application of the South African concepts of received or accrued to a well drafted contract could prevent economic double taxation.

If the South African courts were to apply the OECD Commentary interpretation of the entity paragraph, it is possible that the courts could order a reduction to the withholding tax imposed on the entity.

5.6.2.4. The "entity" or "other person"

Income accruing to an "other person" in respect of personal activities exercised by a sportsperson is taxable in the source State. The "other person" must contextually be a "person" for the purposes of the source State legislation to apply a right to tax. In the case of a company or similar legal entity, this requirement does not create any difficulty. However, where the "other person" is merely an association of persons, difficulties can arise.

In South African law, a partnership is generally not recognised as a person (and certainly not for taxation law).[296] As a transparent entity, the source State would have the right to tax the individual sportsperson partners in a partnership in terms of the sportsperson paragraph. It is submitted that the entity paragraph could not be applied in South Africa against a foreign partnership.[297] This is the case even if the foreign partnership is recognised as a taxable entity in the residence State unless the Contracting States agree otherwise.[298] The USA DTA with South Africa clearly lists a partnership as a person for the purposes of the DTA. This

[296] See Clegg *et al* (2007: Chapter 16.2)

[297] See also Felderer (2007: 279) where in addition he adds that transparent partnerships are generally not "residents" of one of the Contracting States for DTA purposes. This reinforces such partnerships exclusion from the DTA.

[298] See Felderer (2007: 281). Lang (2000: 40-42) is more critical of ignoring the nature of the partnership in the residence State stemming from the OECD Report on the application of the Model DTA to partnerships and the qualification of the income. In particular, this approach is criticised as the likelihood of double taxation remains, especially where withholding taxes are applied (as the credit might not be available to the partnership as the tax was not levied against such partnership (see Lang (2000: 57-58)).

definition would override the South African ITA definition[299] of person recognising such partnership as a person for the purposes of the application of the DTA.

The concept of accrual (see 5.6.2.2 above) clearly indicates that persons acting in agency or fiduciary capacities are not "other persons" for the purposes of the application of the entity paragraph[300] as the income does not accrue to them. Such agents or fiduciaries are not unconditionally entitled to the amounts received on behalf of the sportsperson, nor are such amounts received for that agent or fiduciaries own benefit (see 3.2.4.1 with 5.6.2.2).

5.6.2.5. Additional considerations

Despite the above theoretical considerations (and it is submitted the correct interpretation of the law), application of the entity paragraph by the Contracting States to a DTA can be different. Felderer (2007: 275) refers to the "infection theory" which is loosely based on the "principle of the prevailing activity".[301] The infection theory is so named as small incomes within the scope of the entity paragraph are considered to "infect" the other income bringing all income within the scope of the paragraph. It is submitted that this is, however, contrary to proper application of the principle of the prevailing activity and should be discouraged between states and challenged by taxpayers. Felderer (2007: 275) provides the following:

> "The principle of the prevailing activity as introduced by Art. 17 MN 4 of the commentary has been extended more and more by fiscal administrations of performing states to the point that the entire remuneration for huge shows where the artiste-remuneration is only a very small portion of total proceeds will be taxed in the state of performance on a lump sum basis. The portion of the artiste remuneration in big pop concerts or similar events is often not more than 5-10% of total proceeds. Yet the small portion of the artiste's proceeds may infect all other proceeds, which would normally not be taxable in the state of performance so that the entire package of different services would be considered to be taxable in the state of source".

While such a basis may have been adopted by the states as a "pragmatic simplification approach", it is submitted to be incorrect based on the rules of interpretation (both from a DTA and domestic law perspective).

It is further submitted that Contracting States should negotiate clauses that are less loosely worded to prevent "infection" of incomes. In addition, in the light of mutual assistance and

[299] See 2.4.2 above

[300] Note that this does not exclude the existence of an agency permanent establishment.

[301] The principle of prevailing activity is the DTA equivalent of the South African "dominant source" principle.

collection of taxes clauses, perhaps the time has come to remove the sportsperson article from DTAs (both Model and actual).

5.6.2.6. Triangular situations

Where entities in a third State are interposed between the sportsperson performing in the source State and the sportsperson's residence State, complexities can result. Much of the complexity stems from the fact that the third State entity is not a resident of either the source State or the residence State of the sportsperson.

Vogel (1997: 991) succinctly summarised the appropriate approach to adopt to identify the appropriate DTA (assuming both the sportspersons residence State and the third State in which the entity is resident have DTAs with the source State).

> "The solution to this problem arises from the attribuition of the income in the State of performance (S) under its domestic law:
>
> aa) If, in the State of performance, the income is attributed to the […] sportsman even when paid to the company (the 'look through approach') then Art. 17(2) is unnecessary and Art. 17(1) is controlling […]. The treaty S-R is to be applied. Whether taxation is also possible if the payment is not passed on to the entertainer [read also sportsperson] in the same fiscal year […] is likewise a question for the domestic law of the State of performance".

It is submitted that in addition, where the amount is paid to the sportsperson via an entity and look-through is not applied (such as in South Africa) and domestic law still places a burden of tax on the sportsperson, the DTA between the source State and the residence State of the sportsperson remains relevant. All that is considered in this scenario is that the sportsperson has received payment for performance in the source State.

Vogel continues:

> "bb) If the company is subject to taxation, only Art. 17(2) prevents taxation in the residence State of the company based on Art. 7(1). Controlling is the DTC between S and T [the third 'interposed' State]. The treaty between S and R is not applicable in this case because the company is not resident in either of those contracting States and thus is not entitled to protection by this treaty under Art. 1 MC. […]
>
> Taxation of the company in the source State is not possible if the company does not have a permanent establishment there and the DTC S-T does not contain a provision comparable to Art. 17(2) MC. Such States must either change their DTCs through adding Art. 17(2) or modify their domestic law in the sense of aa) above".

Without look-through and in the absence of the entity paragraph, sportspersons visiting South Africa may route some income through entities in States with which South Africa has a DTA

but no entity paragraph (or sportsperson paragraph).[302] These entities obtain relief from South African taxation using the Business Profits article of the DTA in the absence of the entity paragraph.

For entities in third States which have no DTA with South Africa, there is no relief from the domestic taxation.

5.6.3. Withholding tax in South Africa – alignment with the entity paragraph?

The South African withholding tax application provision (section 47B(1)) provides:

> Subject to subsection (3), there must be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the tax on foreign entertainers and sportspersons, in respect of any amount received by or accrued to any person who is not a resident (in this Part referred to as the "taxpayer") in respect of any specified activity exercised or to be exercised by that person or any other person who is not a resident.

In the context of the entity paragraph, clear conditions are present:

(a) There must be an amount received by or accrued to a non-resident person

(b) In respect of a specified activity exercised or to be exercised by another non-resident person.

As indicated in 5.3.2 and 5.6.2.3 above, the term "income" in the DTAs must be interpreted in context. In addition, the term is used with as wide an interpretation as possible. This facilitates taxation on a gross or net basis. On this basis, the term "income" can be likened to an "amount received or accrued" for South African ITA purposes.

The accrual to a non-resident person does create some difficulties (see 5.6.2.4). Where the residence State treats a partnership as a taxable entity but the DTA does not specify that a partnership is a person (or refer to person as including "any entity that is treated as a body corporate for tax purposes"),[303] it is submitted that the person cannot be recognised for the purposes of applying the entity paragraph. In addition, the misalignment of the phrase

[302] These countries include: Germany; Grenada; Israel; Malawi; Sierra Leone; Switzerland; Zambia and Zimbabwe and the previous DTA with the Netherlands. Note however that a new DTA with the Netherlands is in force from 1 January 2009.

[303] See, for example, the South African DTA with Brazil.

"specified activity" with "personal activity" results in a greater scope to the term "person" in the context of the South African ITA. The misalignment of the phrase "specified activity" is examined in 5.5 and 3.2.3 above.

It is clear that the South African domestic legislation is not entirely aligned to the DTA entity paragraph.

5.7. THE OPTIONAL "CULTURAL EXCHANGE / PUBLIC FUNDS" PARAGRAPH AND OTHER DEVIATIONS

5.7.1. The "cultural exchange / public funds" paragraph

Appendix F contains an analysis of 69[304] South African DTAs concluded, most of which are in force. Of these 69 DTAs, 35 have a "cultural exchange" / "public funds" paragraph. In addition of 3 DTAs ratified after 1 June 2008,[305] two contain such a clause.

Molenaar (2005a) provides: "The 1987 Intra-ASEAN Model Double Taxation Convention has even standardized the 'Article 17(3) clause', so that the provision is widespread in treaties between ASEAN members. The provision has also been included in most ASEAN tax treaties with third countries". This is true for the DTAs that South Africa has entered into with these countries.[306]

Molenaar (2005a) continues: "The multilateral Nordic Convention between Denmark, Finland, Iceland, Norway and Sweden contains Article 17(3) as a standard addition to Article 17.[307] […] The text is comparable to the proposal in Paragraph 14 of the OECD Commentary, although there are two differences: the Nordic Convention requires that (1) the

[304] Examined here are the 64 South African DTAs listed in Appendix C as in force at 1 June 2008, the two extension DTAs for Grenada and Sierra Leone in force (and excluded from Appendix C) plus three DTAs entered into force after 1 June 2008.

[305] The DTAs being Netherlands and Saudi Arabia (which contain such a clause) and Portugal (which does not contain such a clause).

[306] The countries include: Indonesia, Malaysia, the Philippines, Thailand, Singapore, Brunei, Vietnam, Laos, Myanmar and Cambodia of which South African has DTAs with Indonesia, Malaysia, Singapore, and Thailand all of which contain this optional (from an OECD perspective) paragraph.

[307] South African has DTAs with Denmark, Finland, Norway and Sweden. All but Sweden have the OECD optional paragraph. The DTA with Sweden was concluded on 24 May 1995, so it is surprising that the DTA omits this paragraph.

visit to the other state has to be *mainly* financed by public funds and (2) there is only a reference to financing from public funds from the *residence* country. These are subtle but interesting differences".

In 1992 the OECD added paragraph 14 to the commentary containing the text of the optional cultural exchange / public funds paragraph. The commentary has remained unchanged since that date and provides:

> "Some countries may consider it appropriate to exclude from the scope of the Article events supported by public funds. Such countries are free to include a provision to achieve this but the exemptions should be based on clearly definable and objective criteria to ensure that they are only given where intended. Such a provision might read as follows:
> 'The provisions of paragraphs 1 [the sportsperson paragraph] and 2 [the entity paragraph] shall not apply to income derived from activities performed in a Contracting State by artistes or sportsmen if the visit to that State is wholly or mainly supported by public funds of one or both of the Contracting States or political subdivisions or local authorities thereof. In such a case, the income is taxable only in the Contracting State in which the artiste or the sportsman is a resident'."

The wording as recommended in the OECD Model is somewhat clumsy in that it firstly provides that paragraphs 1 and 2 shall not apply. That carries with it the implication that the other distributive articles of the DTA will apply. However the paragraph subsequently provides that the amount shall be taxable only in the sportsperson's state of residence. This appears to provide an exemption from the effects of any of the other distributive articles of the DTA by providing that the income shall be taxable only in the "Contracting State in which the […] sportsman is a resident".

However, as the wording of this optional third paragraph is only recommended in the OECD Commentary, a number of deviations from the wording appear in the actual South African DTAs.

5.7.1.1. Use of "public funds"

The OECD version refers to exemption from the sportsperson paragraph and entity paragraph for activities supported by public funds of *either* State,[308] most DTAs concluded with South Africa have limited the application to activities supported by the sportspersons state of

[308] The South African DTAs permitting override for public funds support from either Contracting State include those with China, Ghana, Hungary, Japan, Korea, Poland, Singapore and the Slovak Republic.

residence only.[309] While such limitation may be justified on the basis that the residence State would like to protect its taxing rights as it has the sponsorship/subsidy outlay,[310] the limitation also prevents a source State from encouraging such visits especially in the context of developing and encouraging participation in a sport through the attraction of international sportspersons performing in that State.

The level of support to be provided by the residence State or source State is often required to be "wholly or mainly" from public funds. In the absence of any supporting documentation to aid the contextual interpretation of such phrase, the domestic interpretation of such language is usually "more than fifty per cent".[311] This implies that sporting activities receiving less than 50% government funding would not qualify for the override of the sportsperson and entity paragraphs.

The inclusion of such an override is logical in the context of government spending. Should the government of the residence State subsidise the sportspersons performing in the source State without the public funds paragraph, a higher subsidy would be required to fund the tax levied in the source State.[312] The clause seems even more appropriate considering the OECD reversal of opinion concerning "government" sportspersons (see 5.4.7 above).

5.7.1.2. Cultural exchanges

Some of the South African DTAs refer to override of the sportsperson and entity paragraphs for "cultural exchanges" agreed by the two Contracting States (some solely to cultural exchanges and others in conjunction with references to public funds).[313] It is unclear whether

[309] DTAs between South Africa and Algeria, Botswana, Brazil, Canada, Cyrus, Denmark, Ethiopia, France, India, Indonesia, Iran, Kuwait, Malaysia, Mauritius, Mozambique, Netherlands (new and not in force 1 June 2008), Norway, Oman, Pakistan, Seychelles, Tanzania, Thailand, Turkey, Ukraine, United Kingdom and the USA.

[310] See Pracht (2007: 346)

[311] This domestic interpretation differs from other countries. Molenaar (2005a: 136) provides the example: "Belgium and the Netherlands have agreed in a commentary on their new 2001 tax treaty that the threshold condition for the word 'mainly' in the treaty should be 30% of total earnings". Pracht (2007: 345) adds to this example, stating: "The German tax authorities require that the sending country has to support at least one-third of the costs of the artistes/the sportsmen for performances abroad".

[312] See also Pracht (2007: 344)

[313] South African DTAs with Algeria, China, Ethiopia, Hungary, Indonesia, Iran, Korea, Mozambique, Netherlands (new and not in force at 1 June 2008), Pakistan, Poland, Seychelles, Slovak Republic, Ukraine and

such reference extends to sporting events agreed by the two Contracting States. Pracht (2007: 342) states that "as the clause refers either explicitly to income of artistes or sportsmen or to income derived from activities referred to in Art. 17 (1) or (2) OECD MC, it is clear from a structural viewpoint that sports exchange programs are also included [in the term 'cultural exchange']".

5.7.1.3. Non-profit organisations

Only one South African DTA refers to non-profit organisations in the public funds optional paragraph. The DTA with Kuwait provides:

> "The provisions of paragraphs 1 and 2 shall not apply to income derived by entertainers or sportspersons who are residents of a Contracting State from personal activities as such exercised in the other Contracting State if their visit to that other Contracting State is wholly or mainly supported from the public funds of the first-mentioned Contracting State, including those of any political subdivision, a local authority or statutory body thereof, *nor to income derived by a non-profit making organization in respect of such activities provided no part of its income is payable to, or is otherwise available for the personal benefit of its proprietors, founders or members*" (*emphasis added*).

From the above provision, the override over the sportsperson and entity paragraphs extends to non-profit organisations. However, such extension is tempered with an anti-avoidance approach to ensure that application of this override is limited to cases of genuine non-profit activity. In addition as the provision merely overrides the sportsperson and entity paragraphs but does not exempt the sportsperson or entity from taxation in the source State, the non-profit organisation may remain liable for taxation in the source State in terms of other distributive articles within the DTA, for example the Business Profits article. Pracht (2007: 339) indicates that the use of such an override for non-profit organisations is rare. Furthermore, Pracht advocates an exemption for such bodies in this override paragraph rather than subjecting the non-profit organisation to the other distributive articles.

The omission of the non-profit organisations from the public funds paragraph could create a significant South African tax problem. In South Africa, non-profit organisations activities for public benefit remain free of taxation for normal tax purposes. The recognition of non-profit organisations (for domestic law purposes "public benefit organisations") is extended to branches of non-resident non-profit organisations registered in South Africa. However, such

the United Kingdom refer to both public fund support and cultural exchange programmes whereas DTAs with Ghana, Japan, and Romania refer only to cultural exchanges.

branches are only exempt from normal taxation. The withholding tax levied for specified activities of sportspersons is exempt from normal tax. Amounts paid to non-profit organisations for a sportspersons performance is not exempt from withholding tax. However, a DTA providing that the non-profit organisation may only be taxed in the residence State would, it is submitted, provide the necessary exemption from the withholding tax responsibility for amounts paid to such non-profit organisations.

Other implications for non-profit organisations, and the taxation in terms of other distributive articles in a DTA, are beyond the scope of this thesis.[314]

5.7.1.4. Exemption or application of other distributive articles

In certain DTAs, the public funds paragraph acts as an override over all distributive articles by exempting the income from tax in the source State or providing, as is the case in the OECD Model, that the income shall be taxed only in the residence State. In others, the paragraph merely overrides the other provisions of the sportsperson article, leaving the income to be taxed in terms of any other applicable distributive article in the DTA.[315] In most cases, it is submitted that there will be little practical difference between the two approaches.[316] The traditional short-stay of sportspersons in the country of performance will generally prevent the source State from taxing such persons and is unlikely to create a permanent establishment. Rather the taxing right remains with the residence State.

5.7.2. Additional overrides / deviations

A newly signed DTA with Germany,[317] not yet in force, provides: "Notwithstanding the provisions of Article 12 [Royalties], income derived by the persons mentioned in paragraph 1 from their personal activities exercised in the other Contracting State shall also include remuneration of any kind paid for the use of, or the right to use, the name, the picture or other personal rights of such persons as well as any consideration for the recording and transmission of the activities mentioned in paragraph 1 by radio or television". This paragraph is similar to the South African court decision in *ITC 1735* as regards the

[314] Refer to Pracht (2007) for further information.

[315] South African DTAs adopting this approach include: Canada, Kuwait and Mauritius. The majority of South African DTAs adopt the exemption approach.

[316] Pracht (2007: 342) agrees with the submission

[317] Signed on 9 September 2008

characterisation of income for domestic law purposes and has no additional effect in South Africa.

The earlier version of the DTA with Germany,[318] currently in force, contained as the sportsperson article, a general override over all other distributive articles. It provided that: "*Notwithstanding anything contained in this Agreement*, income derived by public entertainers, such as theatre, motion picture, radio or television artists and musicians, and by athletes, from their personal activities as such, may be taxed in the Contracting State in which these activities are exercised" (*emphasis added*). This general override implies that royalty payments (in relation to sporting activities, pensions and any other form of income that has a causal link with the public performance in the source State is taxable in such State. Similar wording is found in the DTAs with Malawi and Zimbabwe.

The extension DTAs (in force) with Grenada and Sierra Leone as part of the original 1946 DTA with the United Kingdom (no longer in force) as well as the oldest South African DTA with Zambia each do not contain a sportsperson article. These DTAs do, however, contain reference to sportspersons in that each of the DTAs exclude "athletes" from the scope of the equivalent Dependent Personal Services / Income from Employment article. The result of such exclusion is a source State right to tax irrespective of the length of stay (an effect similar to the sportsperson paragraph).

The DTA with Switzerland[319] was concluded before the introduction of the entity paragraph (in the 1977 OECD Model) to the sportsperson article. The negotiators clearly saw a need (or the potential for the sportsperson paragraph to be abused through the imposition of a company) for an override of a permanent establishment. The DTA provides (after the initial sportsperson paragraph wording): "The same shall apply, notwithstanding the provisions of Article 7, to the income accruing to a person who provides the services of public entertainers or of athletes".

The DTA with Israel[320] contained a similar deviation to that with Switzerland, providing: "Notwithstanding the provisions of Articles 15 and 16, income derived by public entertainers,

[318] Concluded on 25 January 1973 and entered into force on 28 February 1975

[319] The DTA was concluded on 3 July 1967.

[320] The DTA with Israel was concluded on 10 February 1978 and it would appear that the negotiators had not taken the 1977 OECD Model into consideration. This conclusion is unsurprising when the delays between the

such as theatre, motion picture, radio or television artistes and musicians, and by athletes, from their dependent or independent personal activities as such *(including such income derived by corporate bodies controlled by them, or derived by any other person)* may be taxed in the Contracting State in which these activities are exercised. *The fact that the corporate body or other person has no permanent establishment in the Contracting State in which these activities are exercised shall not preclude that State from taxing the income so derived*" (*emphasis added*). It is submitted that this deviation has the effect of the entity paragraph in the sportsperson article. In addition, the deviation recognised the evasion / abuse element that led to the 1977 OECD amendment (and is similar to the restriction of the override to abusive activities as contained in the DTAs with Canada and the United States.[321]

5.8. TAXATION ON A NET OR GROSS BASIS (OR AT ALL?)

5.8.1. Decisions of the European Court of Justice

Recent court decisions from the European Court of Justice (ECJ) have resulted in a change in thinking as regards the taxation on a gross or net basis for sportspersons.[322] Two of the major decisions, namely *Arnoud Gerritse v Finanzamt Neukölln-Nord* C-234/01 ECJ (2003) ("*Gerritse*") and *FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel* C-290/04 ECJ (2006) ("*Scorpio*") are key to the changes.[323]

Both decisions related to the European Community Treaty ("EC Treaty") and the "Four Freedoms" within that treaty. As regards the *Gerritse* decision the ECJ found:

> "Articles 59 and 60 of the Treaty preclude a national provision such as that at issue in the main proceedings which, as a general rule, takes into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income, after deduction of those expenses.
>
> However, those articles of the Treaty do not preclude that same provision in so far as, as a general rule, it subjects the income of non-residents to a definitive tax at the uniform rate of 25%, deducted at source,

conclusion of negotiation and date of signature are considered. The comments concerning the DTA with Switzerland are therefore equally applicable to the DTA with Israel.

[321] These two States have also entered reservations in this regard to the OECD Model. While Switzerland has also entered the same reservation concerning the limitation of override of paragraph 2 to abuse situations, the South African DTA with Switzerland was concluded prior to the introduction of the 1977 OECD amendment.

[322] The contrasting domestic impact of taxation on a net or gross basis is considered in 3.3.4.

[323] As the language of both of these cases was German, the case information has been drawn from van Raad (Vol 2) (2008: 2140-2145 and 2409-2417). Additional support can be found in Molenaar *et al* (2003), Molenaar (2006c) and Felderer (2007: 272-273).

whilst the income of residents is taxed according to a progressive table including a tax-free allowance, provided that the rate of 25% is not higher than that which would actually be applied to the person concerned, in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance" (van Raad, 2008: 2145).

From the above extract it is clear that EU countries must allow the deduction of business expenses for non-resident sportspersons. However, such country may still apply a withholding tax system to such a sportsperson provided the tax applied would not exceed that levied on a resident *mutatis mutandis*.

The *Scorpio* decision took the above issues further. Molenaar (2006c) summaries the effects as follows:

"The ECJ has decided that Germany needs to allow the deduction of direct expenses already at the time of the performance of the non-resident artist. Not only gross taxation, but also a refund system after the performance is in breach with the EC Treaty. This means that Germany has to follow the UK and (almost late) Dutch system, that expenses can be deducted before the performance and that the withholding tax can only be levied from the net profit.

[…]

Germany has defended itself against this several times, even after the Gerritse decision of the ECJ. They only widened their tax refund system after the performance, but sticked to their gross taxation. This has now finally been disapproved by the ECJ, gross taxation at the time of the performance is in breach with the freedom principles of the EC Treaty.

The ECJ has also decided on other issues in the Scorpio case, e.g. it ruled that a withholding tax from non-resident artists is in general not in breach with the EC Treaty, that indirect expenses may be allowed to be only deductible in a refund procedure afterwards and that an official procedure for a tax exemption based on a bilateral tax treaty does not breach the freedom principles of the EC Treaty. These points restrict the position of non-resident artists, but are only of minor importance if compared with the decision regarding the deductibility of direct expenses at source".

From the *Scorpio* decision, expenses incurred by sportspersons are deductible before the withholding is made, and further, that the withholding should be based on the net amount. In response to these decisions, the OECD has amended paragraph 10 of the 2008 OECD Commentary. The paragraph now provides (the italicised text having been added):

"10. The Article says nothing about how the income in question is to be computed. It is for a Contracting State's domestic law to determine the extent of any deductions for expenses. Domestic laws differ in this area, and some provide for taxation at source, at a low rate based on the gross amount paid

> to artistes and sportsmen. Such rules may also apply to income paid to groups or incorporated teams, troupes, etc. *Some States, however, may consider that the taxation of the gross amount may be inappropriate in some circumstances even if the applicable rate is low. These States may want to give the option to the taxpayer to be taxed on a net basis. This could be done through the inclusion of a paragraph drafted along the following lines:*
>
> *Where a resident of a Contracting State derives income referred to in paragraph 1 or 2 and such income is taxable in the other Contracting State on a gross basis, that person may, within [period to be determined by the Contracting States] request the other State in writing that the income be taxable on a net basis in that other State. Such request shall be allowed by that other State. In determining the taxable income of such resident in the other State, there shall be allowed as deductions those expenses deductible under the domestic laws of the other State which are incurred for the purposes of the activities exercised in the other State and which are available to a resident of the other State exercising the same or similar activities under the same or similar conditions*".

It must be noted that these decisions are only binding on the European Community States. However, it does point to the need to balance the collection of taxes with prevention of excessive taxation of non-residents (that could lead to a decline in the number of performances taking place in the source State). In addition, it would seem that the above decisions are not binding on the European Community State when the other party is resident in a non-European Community State.[324]

To date, no South African DTA has incorporated the OECD suggested wording primarily, it is submitted, because the change is too recent to have affected DTA negotiations. However, it will be of interest to see whether such wording is incorporated into future DTAs or whether existing DTAs will be amended by protocol in the near future.

5.8.2. Recent developments in the Netherlands

DTAs have as their purpose the avoidance of double taxation and the prevention of fiscal evasion. One of the policy reasons for source taxation in a domestic economy is described by Holmes (2007: 19-21) as stemming from the "benefit theory". Loosely put, the benefit theory is that the non-resident has made use of the source State's resources. Taxation levied is meant to contribute to such State to the extent to which the non-resident has benefited from / utilised such resources.

[324] Case I R 22/02. The countries involved were Germany (EU State) and the United States. The case summary provides: "The Federal Tax Court then held that, since the taxpayer was neither a national nor a resident of one of the Member States of the European Community, the "Gerritse" jurisprudence (Case C-234/01) could not apply".

It is certainly debatable the extent to which sportspersons performing in South Africa utilise the countries resources. It is undisputed that a select few can command large performance fees and other revenues in a short period of time. However, where the support to earn such revenue is drawn largely from the residence State, taxation in the source State appears to be in conflict with such benefit theory.

The Netherlands has recognised the shortcomings of taxing performing sportspersons (and artistes) separately and as a result of such short stays that cannot be said to have utilised to any great extent the resources of the country. However, with the objectives of DTAs in mind, from 1 January 2007, the Netherlands no longer levy taxation on non-resident sportspersons (and artistes) where such sportsperson is resident in a State with which the Netherlands has a DTA.

This exemption from taxation still prevents fiscal evasion in the limitation of the exemption to residents from States that have DTAs with the Netherlands. In addition, as the residence States remain able to tax the sportspersons, exemption in the Netherlands also prevents double taxation. In addition, recognition of greater economic ties with the residence State is also achieved.[325]

The 1987 OECD Report recognised a need for improvement between States of exchange of information and assistance in the collection of taxes. It is submitted that the Netherlands have also recognised an improvement in this area of international taxation, negating the need for specific anti-avoidance / evasion articles in a DTA. Chapter 6 further explores the improvements in exchange of information and the impact on the sportsperson article.

[325] See also Sriram (2005: 57) in which it is stated that: "[p]urely from an economic perspective the incidence of a Jock [sportsperson] tax is not congruent with the location of economic activity that gives rise to it, a misalignment that leads to economic inefficiencies" and further that "the argument raised against the structural anomaly in a scheme of source-based Jock taxation is that the revenues out of which a professional athlete receives his salary is earned through economic transactions in his team's home State, and not in the other states in which he performs. In other words, the residents of jock tax states receive benefits for which they do not pay through their own taxes. At the same time, residents of the State in which the athlete resides face costs for which they do not receive proportional benefits". See also Holmes (2007: 19-21) with reference to the benefit theory.

The approach by the Netherlands was also prompted by the belief of the Netherlands government that "the tax revenue from this special group of taxpayers is too low and the administrative burden is too high to justify a source taxation" (Molenaar, 2006a). Of particular interest is the view that the administrative burden to collect a small percentage of revenue was considered to be too high to justify the on-going system of taxation of the non-resident sportspersons. One of the reasons for South Africa's introduction of the withholding tax regime was one of "practicality". However, no mention was made in the justification for the introduction of the withholding tax to the efficiency of collection. If the cost of collection is near to or exceeds the amount collected, surely the levy of the tax is not practical (and therefore the tax is not necessary).

5.9. CONCLUSIONS

It is clear from the earlier sections of this chapter that the sportsperson article has a fairly narrow focus as regards persons included in the scope of the article and the income subject to its provisions. The withholding tax on sportspersons was introduced into the South African Income Tax Act with the aim of achieving practical collection of taxes levied on sportspersons. The reasons for its introduction echo, in some respects, the 1987 OECD Report with reference to the difficulty of collection as a result of the short stay of the sportspersons.

As can be seen in chapter 3 and this chapter, the South African withholding tax has not been fully aligned with the principles stemming from the sportsperson article in the Model or South African DTAs. Rather the sportsperson article can cover instances in which South African normal tax is levied on some income and withholding tax on other income. This seems far removed from the intention of introducing a withholding tax as a practical method of collection. In addition, South Africa, unlike the EU countries which are bound by the ECJ decisions, is not prevented from applying the withholding tax on a gross basis (the OECD Commentary provides for both bases in its latest version[326]).

It is submitted that the mismatch of principles between the South African Income Tax Act and the sportsperson article achieves only greater complexity for the non-resident sportsperson. Aside from reasons for amendment (or even deletion) of the sportsperson article, it is

[326] See paragraph 10 of the 2008 OECD Commentary

submitted that at least the withholding tax legislation should be aligned with the sportsperson article. In this way practical efficiencies will be found.

This chapter also highlights the lack of relevance that the sportsperson article holds in DTAs currently in force. The original purpose of evasion may have held relevance when sportspersons (and entertainers) represented the bulk of mobile business and individuals. In the business world today, employees and independent contractors as well as businesses are as (if not more) mobile than sportspersons. It is submitted that the sportsperson article needs to be deleted and replaced with a more appropriate article concerning all mobile workers and business.

CHAPTER 6

EXCHANGE OF INFORMATION ON SPORTSPERSONS

6.1. INTRODUCTION

The main purpose for the introduction of the sportsperson article in the OECD Model and DTAs appears to be the prevention of fiscal evasion (in the main) and fiscal avoidance (an ancillary purpose) (see 5.2 above). One of the most significant problems identified, necessitating the introduction of the specific sportsperson article, was lack of exchange of information between Contracting States.

Improved exchange of information would also require an improvement in assistance between States for the collection of taxes (where the taxpayer evades payment of taxes levied in the residence State but performs (and retains funds) in a Contracting State).

The 1987 OECD Report identified the lack of exchange of information, poor use of mutual agreement procedures and limited assistance in the collection of taxes as areas requiring improvement in the taxation of sportspersons. While these proposals were made in the context of retaining the sportsperson article, it is submitted that significant improvements in these areas may negate the need for the sportsperson article (see 5.8 and 5.9).

There has been a definite surge in international activity concerning the exchange of information, particularly the conclusion of administrative assistance treaties between so-called financial tax havens[327] and other Contracting States. Of the 98 Administrative Assistance treaties listed on the IBFD database,[328] 27 were signed in 2009 (with more anticipated), 19 in 2008, 12 in 2007 and 13 since 2000. In addition, the OECD has issued (on 23 January 2006) the Manual on the Implementation of Exchange of Information Provisions for Tax Purposes.

[327] Larking (2001: 347) describes the term "tax haven" as follows: "The term does not have a precise technical meaning. It has been described as referring to countries which are able to finance their public services with no or nominal income taxes and that offer themselves as places to be used by non-residents to escape tax in their country of residence. In addition to these features the OECD has identified the following typical 'conforming' features of a tax haven: (i) lack of effective exchange of information, (ii) lack of transparency, and (iii) no requirement for substantial activities".

[328] As at 11 May 2009 but eliminating duplicates (for treaties signed in more than one language) and model treaties until 2000.

The OECD states that the "[e]xchange of information is an important tool in fighting non-compliance with the tax laws in an *increasingly borderless world.* The Committee on Fiscal Affairs is working to improve exchange of information both from a legal and a practical perspective" (*emphasis added*).[329]

"In today's globalised economy effective information exchange is essential for countries to maintain sovereignty over the application and enforcement of their tax laws and to ensure the correct application of tax conventions. While *taxpayers can operate relatively unconstrained by national borders*, tax authorities must respect these borders in carrying out their functions. Exchange of information provisions offer them a legal framework for co-operating across borders without violating the sovereignty of other countries or the rights of taxpayers" (*emphasis added*).[330]

States continue to note and react to the importance of exchange of information. For example, in Italy "for proceeds received by non-resident entities, the applicable tax law provides for no tax on proceeds from shares in real estate funds received by entities that for tax purposes are resident in foreign countries that *allow for an adequate exchange of information*" (*emphasis added*).[331] Similarly in the Netherlands, no withholding tax is levied on non-resident sportspersons performing in the Netherlands if that sportsperson is from a State with which the Netherlands has concluded a DTA (see 5.8.2). Both of these examples point to the negation of taxes where a DTA exists and indicates that such countries are satisfied that sufficient and efficient exchange of information can take place.

This chapter aims to analyse the exchange of information article[332] (where included – refer Appendix H) of the South African DTAs to determine whether sufficient scope exists to use the provisions of that article to ensure appropriate taxation of sportspersons and further

[329] Available at: http://www.oecd.org/department/0,3355,en_2649_33767_1_1_1_1_1,00.html [11 May 2009]

[330] Available at http://www.oecd.org/about/0,3347,en_2649_33767_1_1_1_1_1,00.html [11 May 2009]

[331] Assegnati, F. & Galeano, G. A. 2008. *Italian Real Estate Closed Funds in the real estate market? The tax perspective*, TPI Review. Available at: http://www.hostref4.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=BNAI:10.1048/Enu [Trial database] [13 May 2009]

[332] Refer Appendices I – L for detailed analysis of the exchange of information article in South African DTAs

support the deletion of the overly specific sportspersons article.[333] This chapter does not aim to identify the frequency/effectiveness with which the exchange of information article is used. Keen *et al* (2006: 94) observes that:

> "Very little is known about [...] the extent, nature or, *especially, the effectiveness* of international information sharing. Most countries treat information on the extent and use of information sharing with considerable confidentiality. This reticence is no doubt intended to create a healthy uncertainty amongst taxpayers - the perception that information is shared being seen as having a salutary effect in itself. […] In the longer term, however, one would expect the perception to come to match the reality".

As South Africa has not concluded treaties specific to only administrative assistance for income tax purposes,[334] such model administrative assistance treaties are not specifically examined (except insofar as is relevant to the discussion).

6.2. THE 1987 OECD REPORT

The 1987 OECD Report examined the issue of the taxation of sportspersons. From the Committee's conclusions, particular international issues impacting on the taxation of sportspersons was poor use of the exchange of information article in DTAs and insufficient assistance in the collection of taxes.

6.2.1. OECD Report conclusions on the exchange of information

The OECD Committee on Fiscal Affairs concluded (in paragraphs 106 and 107 of the 1987 OECD Report) that:

> "106. It emerges from country experiences that, with the exception of a few countries, little information is obtained through the exchange of information article of double taxation conventions. The Committee recommends that Member countries make a more intensive use of such exchanges, either upon request, or preferably spontaneously, when tax authorities of the Contracting State come to learn that some of their residents are about to visit the other State or when a resident of that State has performed services in the first-mentioned State. It is suggested that competent authorities could usefully issue special instructions or guidelines for dealing with exchanges of information in this area. In the absence of effective exchanges, income of [...] athletes is likely to go very lightly taxed, or even not taxed at all when exemption is provided for in the State of performance.

[333] Whether the sportsperson article should be replaced with an article covering all mobile workers is discussed in chapter 5.

[334] South Africa has mutual administrative assistance DTAs with respect to Value-Added Taxation (VAT) (7 under negotiation with none ratified in South Africa or in force) and Customs Duties (9 in force – including 1 multi-national agreement with India and Brazil; 8 ratified only in South Africa and 10 under negotiation).

> 107. Admittedly it may be difficult for a State to inform the other of impending visits there. However, some countries with a sophisticated (possibly centralised) information system on artistic and sporting activities may be in a position to send such advance information. As for information which the State of residence of the performers would need for its domestic taxation, there are quite a few details the transmission of which could be agreed upon and organised: information necessary to verify the facts about the performance, the amounts paid (both remuneration and tax levied at source), the nature of the tax at source, the residence claimed by the [sportsperson] etc. […] Although quick, automatic or spontaneous exchanges would be desirable, the relevant procedures are therefore difficult to establish in this case".[335]

These conclusions have aided the development of the exchange of information clause in bilateral treaties (see 6.3 and 6.4 below).

6.2.2. OECD Report conclusions on the assistance in collection

The OECD Committee on Fiscal Affairs concluded (in paragraphs 108 and 109 of the 1987 OECD Report) that it was largely the mobility of artistes and athletes which created difficulties in the collection of taxes levied on such persons. The committee submitted that States having domestic laws to assist in the collection of taxes levied in other States should be encouraged to conclude bilateral treaties to provide such assistance.

South Africa has, since the promulgation of the Income Tax Act of 1962, had a provision to provide assistance with the collection of taxes of other States (where a DTA had been concluded). As the South African DTA network has grown significantly since the first democratic elections in 1994, States that have concluded DTAs would now be able to request assistance from SARS for the collection of taxes levied.

The committee also noted the success of some States in the collection of taxes where a centralised system to monitor visits of sportspersons (or artistes) was in place. However the committee tempered their observation with the comment that international co-operation between States would still be required for the effective collection of taxes.

Lastly, the committee encouraged States to use mutual agreement procedures to resolve differences in national interpretations for assistance in the collection of taxes.

[335] 1987 OECD Report

6.2.3. Conclusions

While the conclusion of the 1987 OECD Report flagged the issue of lack of exchange of information and lack of assistance in the collection of taxes, it did not go far enough to submit that improvement in these administrative areas could lead to the deletion of the sportsperson article. It was certainly clear the lack of exchange of information between the States allowed sportspersons to evade taxation in the residence State through non-disclosure of their earnings in the source State. The mobility of the sportsperson was a key factor in the inability of the residence State to both obtain the necessary information, or if supplied, collect the taxes levied.

It is submitted that based on the benefit theory, the limited use of a source States resources by non-resident sportspersons does not justify their taxation where other equally mobile workers are only taxed (subject to certain limitation) in the residence State. Thus where appropriate and effective channels exist to ensure the taxation of the amounts earned by sportspersons (or directed through entities) in the residence State, the sportsperson article should not be used to provide a taxing right to the source State where a similar right does not exist for similarly mobile workers.

6.3. INTERNATIONAL DEVELOPMENT IN EXCHANGE OF INFORMATION

The OECD (and to some extent the EU) has been actively pursuing the end of "harmful tax practices". The main focus has been on the so-called tax havens. Key indicators of harmful tax practices include lack of transparency and an unwillingness to exchange information.[336] Extensive campaigns against States that do not provide for exchange of information were conducted by both the OECD and EU, placing pressure on such States to change their tax systems to conform with an "internationally agreed standard".

In an article addressing the world-wide response to the campaigns (mainly of the OECD and EU) against harmful tax practices, Baker (2004: 16) states that: "[t]he one key factor you have to have in your tax system is effective exchange of information and transparency. So it is clearly [a] harmful [practice] if you do not enter into tax information exchange agreements.

[336] See the 1998 OECD Report on "Harmful Tax Competition – An Emerging Global Issue"; Baker (2004: 5) and Larking (2001: 347).

Increasingly, countries are moving to recognise an actual active duty to gather information for purposes of exchange".

By November 2008, Dayananda (2008) provided that: "[s]ince September 29, 2008, 17 bilateral Tax Information Exchange Agreements have been concluded between Jersey, Guernsey, the BVI ['British Virgin Islands'] and the Isle of Man, and various Organisation for Economic Cooperation and Development (OECD) member countries. This recent flurry of activity represents nearly 40 per cent of the TIEAs ['Tax Information Exchange Agreement'] signed since the OECD produced a model agreement in 2000, and many more TIEAs are under negotiation". The focus again was on tax havens and not standard bi-lateral DTAs concerning taxes on income and on capital. However, the increase in specific exchange of information DTAs with tax havens and pressure on States to update (by protocol) or conclude new DTAs, which include the latest exchange of information clause, is evident.[337]

South Africa is listed on the "progress report on the jurisdictions surveyed by the OECD Global Forum in implementing the internationally agreed tax standard"[338] as one of 40 countries that have "substantially implemented the internationally agreed tax standard"[339]. South Africa has DTAs in force with 30 of the other 39 countries. This categorisation implies that South Africa has an acceptable system of exchange of information. Of 69[340] South African DTA's examined, only the 1967 DTA with Switzerland[341] excludes an exchange of information clause.

[337] See Krause *et al* (2009).

[338] Available at: http://www.oecd.org/dataoecd/50/0/42704399.pdf (dated 7 May 2009)

[339] "The internationally agreed tax standard, which was developed by the OECD in co-operation with non-OECD countries and which was endorsed by G20 Finance Ministers at their Berlin Meeting in 2004 and by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting, requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged". Available at: http://www.oecd.org/dataoecd/50/0/42704399.pdf (dated 7 May 2009)

[340] This number includes all the DTAs in force at 1 June 2008 and adds others ratified after that date.

[341] It should be noted that the new DTA signed with Switzerland (8 May 2007 and effective 1 January 2010) includes an exchange of information clause (however not to the full extent of the 2008 OECD Model clause). Olivier *et al* (2008: 362) make the comment that the old DTA with Switzerland does not contain the exchange of information clause "no doubt due to the strict bank secrecy laws that exist in Switzerland". It is submitted that the same reason applies to the limited exchange of information clause of the new DTA with Switzerland (which seems to have rather been based on the UN as opposed to the OECD Model).

Pocock (2001) proposes that exchange of information is the ideal answer to ensuring that the right person is taxed appropriately by the appropriate State. In addition, he is of the view that withholding taxes can never achieve the ideal state of right person, right tax and right country. It is submitted that this view is correct, but should be tempered with the understanding that changes required to permit full exchange of information between States will take some years to achieve.[342] In particular, while numerous bilateral DTAs for taxes on income and on capital worldwide contain an exchange of information article, not all these articles are of equal scope (as wide as the 2008 OECD Model version). In addition, some of the specific tax information exchange agreements between the "tax haven" States and other States are also not as broad as envisaged by the OECD.

There has been an increase in the number of economic papers on the effect that exchange of information with and without withholding taxes has on Contracting States.[343] These papers have generally come to the same conclusion that exchange of information is beneficial between States. It should, however, be noted that all these papers addressed "capital income" (i.e. passive income from investment such as interest) and not direct incomes such as those from performance. Despite this limitation on the studies to date, it is submitted that States can only benefit from exchanges of information.

It appears that good exchange of information systems and processes do not themselves negate withholding and other taxes, rather exchange of information supplements the taxation systems worldwide[344] to ensure appropriate taxation of incomes.[345] However, efficient exchange of

[342] Krause *et al* (2009): "While it will take months, if not years, for international financial centres to revise their domestic laws and treaties to conform with the promises they have made to the international community, the members of the G20, and particularly the United States, have pledged to monitor whether those promises are converted to practicalities, particularly in light of declining tax revenues as a result of the global economic crisis. While a long road ahead may remain in the drive towards fiscal transparency, the international community and the G20 in particular have made it clear that there is only one road to travel".

[343] See Keen *et al* (2005, 2006 and 2006a); Bacchetta *et al* (2000) and Eggert *et al* (2002).

[344] See the example in Molenaar (2005a: 313) in which the Mutual Assistance Memorandum between the Netherlands and Sweden includes an exchange of information of earnings of sportspersons in terms of Article 17 of the DTA between those two countries.

[345] Keen *et al* (2006: 105) states that: "[i]n principle, information sharing can serve as a substitute for – indeed may even have less distortionary effects than – coordination of tax systems: with full enforcement of the residence principle, the adverse effects of tax competition would be muted".

information systems do prevent tax evasion and in so doing remove the main purpose of the sportsperson article, which is submitted to be overly specific in a global economy. A new article for all mobile workers could be set in place in conjunction with negotiated withholding rates for source States and exchange of information procedures. In so doing, tax evasion is prevented and appropriate taxes are levied (irrespective of the specific country in which such tax is levied).[346]

It would seem that there is an international move to greater exchange of information between States. It is submitted that this is a natural progression in a technological world where business is highly mobile and not bound to a particular State.[347] The current world recession should, it is submitted, increase the motivation for States to exchange information and by so doing better collections for all States.

Efficient and appropriate exchange of information when coupled with appropriate withholding taxes on income can only serve to ensure appropriate taxes are levied and thus meet the ideal postulated by Pocock (2001) that the right tax be levied on the right person in the right State. It is therefore necessary to examine the exchange of information as permitted by the model DTAs on which South African DTAs are based, namely OECD, UN and USA.[348]

6.4. THE MODEL EXCHANGE OF INFORMATION ARTICLES

6.4.1. The 2008 OECD Model and its development

The exchange of information article has varied significantly since the first OECD Model was issued in 1963. It currently provides in the 2008 OECD Model:

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

[346] By agreeing on a level of withholding tax, source States are likely to be more willing to provide the administrative assistance as well as benefitting from the taxpayers performance in that State.

[347] But as noted by Bird *et al* (2008: 799): "Neither internal nor external sources of information are of any use in the absence of an efficient system of monitoring, or of adequate IT infrastructure to collate and store data with easy access for retrieval and cross-checking".

[348] Of these models, the most critical is that of the OECD as the current "South African Model" exchange of information article mirrors the 2008 OECD Model article.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
   a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
   b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
   c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

Key changes to the OECD Model between 1963 and 2008 include:

(a) The 1977 OECD Model extended the permissible disclosures of information exchanged (see paragraph 1) to include courts and administrative bodies and the functions of enforcement or prosecution. Information exchanged could also be disclosed in court proceedings. In addition, the exchange of information was not restricted to the residents of the Contracting States (the exchange of information article was not limited by the "Persons Covered" article).

(b) The 2000 OECD Model expanded the scope of the taxes contemplated within the exchange of information article. Prior to the amendment, exchanges of information could

only take place with reference to taxes of the DTA. The new wording was inserted to extend the scope to "taxes of every kind and description" (see paragraph 1). This also resulted in the exchange of information not being limited by Article 2 of the DTA (usually the "Taxes Covered" article).

(c) The 2005 OECD Model added paragraphs 4 (information exchange despite no tax relevance for requested State) and 5 (no prevention of exchange of information where held by a financial institution) to the Model.

While the 1963 OECD Model only provided for exchange of information on request[349] by one of the Contracting States, the 1977 OECD Model provided for exchanges by request, automatically or spontaneously.[350]

The bulk of the amendments to the exchange of information article formed part of the 2005 OECD Model. The 2008 OECD Commentary specifically refers to these changes and notes:

> "4. In 2002, the Committee on Fiscal Affairs undertook a comprehensive review of Article 26 to ensure that it reflects current country practices. That review also took into account recent developments such as the Model Agreement on Exchange of Information on Tax Matters developed by the OECD Global Forum Working Group on Effective Exchange of Information and the ideal standard of access to bank information as described in the report Improving Access to Bank Information for Tax Purposes. As a result, several changes to both the text of the Article and the Commentary were made in 2005.
>
> 4.1 Many of the changes that were then made to the Article *were not intended to alter its substance, but instead were made to remove doubts as to its proper interpretation.* For instance, the change from "necessary" to "foreseeably relevant" and the insertion of the words "to the administration or enforcement" in paragraph 1 were made to achieve consistency with the Model Agreement on Exchange of Information on Tax Matters and were not intended to alter the effect of the provision. New paragraph 4 was added to incorporate into the text of the Article the general understanding previously

[349] See Krabbe (1987) where the court applied the 1977 interpretation of wider forms of exchange of information to transactions concluded prior to the 1977 OECD Model and the relevant DTA. As one of the aims of a DTA is the prevention of fiscal evasion, it is submitted that the courts can interpret the exchange of information article broadly.

[350] Holmes (2007: 394) summaries the types of information exchange as follows: "Exchange of information on request is self-explanatory. Information is exchanged automatically under some systematic transmission arrangements between the DTA partner states, e.g. electronic databases of non-resident withholding taxes collected by a source state (and the types and amounts of income on which it was collected) from residents of the other contracting state.

Spontaneous provision of information arises where the tax authorities of one state come across information about a taxpayer (usually through an investigation), consider it to be of interest to the tax authority of the DTA partner state and voluntarily send it to that authority".

> expressed in the Commentary (cf. paragraph 19.6). New paragraph 5 was added to reflect current practices among the vast majority of OECD member countries (cf. paragraph 19.10). The insertion of the words "or the oversight of the above" into new paragraph 2, on the other hand, constitutes a reversal of the previous rule.
>
> 4.2 The Commentary also has been expanded considerably. This expansion in part reflects the addition of new paragraphs 4 and 5 to the Article. Other changes were made to the Commentary to take into account recent developments and current country practices and *more generally to remove doubts as to the proper interpretation of the Article*" (*emphasis added*).

It is submitted that some of the changes to the OECD Model were also prompted by its 1998 report on Harmful Tax Practices. In particular the inclusion of the financial institutions paragraph (see paragraph 5 in 6.4.1 above) appears to be a direct reference to those states (whether OECD Member States or not) that engaged in alleged harmful tax practices through preventing the disclosure of bank information.

Not all articles of South African DTAs are based exclusively on the OECD Model. Some South African DTAs have also borrowed extracts from the articles in the UN Model and, in the case of the DTAs with the USA and Canada, the USA Model.[351]

6.4.2. UN and USA Model articles for Exchange of Information

The UN Model has remained largely unchanged between the 1980 and 2001 models. Schaumberg et al (2000: 523 fn 8) states: "A comparison with Art. 26 of the [2000] OECD Model shows that there is no factual difference in the scope of the provisions. The provision in the UN Model, however, makes it clear that the competent authorities can determine the nature and methods of the exchange of information themselves and that tax evasion and tax avoidance are expressly included in the purpose of the exchange of information".[352]

While the 2005 and 2008 OECD Models deviate from the 2000 (and hence the UN Model), the OECD Commentary clearly indicates that: "paragraph 4 was added to incorporate into the text of the Article the general understanding previously expressed in the Commentary" and that "paragraph 5 was added to reflect current practices among the vast majority of OECD member countries". These additions appear to not have been intended as material deviations from past exchange of information articles.

[351] See Appendices I – L for detail

[352] Vogel (1997: 1416-1417) concurs.

The 2006 USA Model exchange of information article, with some minor textual differences, mirrors the 2008 OECD Model article. However, the USA Model article[353] continues:

> "6. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings).
>
> 7. Each of the Contracting States shall endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not inure to the benefit of persons not entitled thereto. This paragraph shall not impose upon either of the Contracting States the obligation to carry out administrative measures that would be contrary to its sovereignty, security, or public policy.
>
> 8. The requested State shall allow representatives of the requesting State to enter the requested State to interview individuals and examine books and records with the consent of the persons subject to examination.
>
> 8. [sic] The competent authorities of the Contracting States may develop an agreement upon the mode of application of this Article, including agreement to ensure comparable levels of assistance to each of the Contracting States, but in no case will the lack of such agreement relieve a Contracting State of its obligations under this Article".[354]

The additional paragraphs appear to mainly be concerned with the method and type of information collection permitted by the DTA, in particular allowing representatives of the requesting State to enter the requested State to examine the information.

6.5. EXCHANGE OF INFORMATION AND THE SPORTSPERSON ARTICLE PURPOSE

6.5.1. 1963 OECD Model

The 1963 OECD Model article on Exchange of Information was very basic. Its purpose was to provide the rules in terms of which "information may be exchanged with a view to laying the proper basis for a *taxation under the Convention*" (*emphasis added*).[355] The type of information exchange contemplated in the 1963 OECD Model article pertained to the application of the Convention, such as information for the allocation of profits to a permanent establishment or taxes levied in the source State for the purposes of the credit method.

[353] The extract is drawn from the 2006 USA Model, but differs little from its 1996 and 1981 counterparts.

[354] While the numbering of the 2006 USA Model differs from the 1996 USA Model, the content remains essentially similar.

[355] 1963 OECD Commentary paragraph 1

However, the 1963 OECD Commentary did state: "It should be noticed that the main rule on exchange of information *is applicable* in many cases where information is required for the *prevention of fiscal fraud or fiscal evasion.* The Contracting States should be free, however, to *agree bilaterally on special provisions* intended to prevent fiscal fraud or evasion of tax" (*emphasis added*).[356] As the sportsperson article was specifically introduced with the express purpose of the prevention of fiscal evasion, it is submitted that the OECD members deemed exchange of information to not yet be effective with regard to sportspersons performing in the source State. Thus, at that time, perhaps the sportsperson article was necessary.

4 of the South African DTAs (including 2 treaty extensions) in force at 1 June 2008 pre-date the 1963 OECD Model and 3 base the exchange of information article on the 1963 OECD Model.

6.5.2. 1977 OECD Model

By 1977, the OECD recognised that: "in view of the increasing internationalisation of economic relations, the Contracting States have a *growing interest* in the reciprocal supply of information on the basis of which domestic taxation laws have to be administered, even if there is no question of the application of any particular article of the convention" (*emphasis added*).[357] The extension of scope beyond the mere application of the convention (but still limited to the taxes covered thereunder) was a step towards greater exchange of information.

The 1963 reference to the application of exchange of information to prevent fiscal evasion was deleted, however, the anti-avoidance (and prevention of evasion) entity paragraph (see 5.6 above) was inserted into the sportsperson article of the OECD Model. This carries the clear message that exchange of information was insufficient to prevent the avoidance techniques employed by the highly mobile sportsperson.

In addition, the 1977 OECD Commentary (paragraph 3) merely made mention of the possibility of States to include in the DTAs an article concerning assistance in the collection of taxes i.e. even if the exchange of information was successful, the residence State may be unable to collect the taxes levied if the taxpayer remained mobile.

[356] 1963 OECD Commentary on Article 26 paragraph 6

[357] 1977 OECD Commentary on Article 26 paragraph 1

The 1977 OECD Commentary provided:

> "Experience in recent years has shown that the text of the Article in the 1963 Draft Convention left room for different interpretations. Therefore it was felt desirable to clarify its meaning by a change in the wording of the Article and its Commentary without altering its effects. Apart from a single point of substance […] the main purpose of the changes made has been to remove grounds for divergent interpretation".[358]

It can be seen from this extract that the Commentary inserted was mainly aimed at clarification and can therefore be applied to DTAs concluded earlier.[359] The only point of departure (the single point of substance referred to in the extract above) was the expansion of the permissible disclosure of information exchanged in court proceedings or judicial decisions.[360]

The bulk of the South Africa DTAs were concluded before the 2000 OECD Model (but after the 1963 OECD Model). These DTAs base the exchange of information article on the 1977 OECD Model. 14 of these have extracts from the 1980 UN Model exchange of information article. In addition, the Canadian DTA uses an extract from the 1981 USA Model and the USA DTA is based mainly on the 1996 USA Model.

6.5.3. 2000 and 2003 OECD Models

The 2000 OECD Model introduced the expansion of the exchange of information article to domestic taxes of each Contracting State. The article provided that assistance could be given to a State by means of exchange of information on matters unrelated to the taxes covered by the Convention. However, the information exchange should not provide information on domestic tax laws that would be contrary to the Convention (i.e. create double taxation or violate non-discrimination provisions in the Convention[361]).

Practical exchanges of information were considered by example in the 2000 OECD Commentary. These examples demonstrated the application of types of exchanges. To some extent the "industry-wide" exchange of information example was as a result of the OECD's work on Harmful Tax Practices. The example provides for: "an industry-wide exchange of

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[358] 1977 OECD Commentary on Article 26 paragraph 4

[359] Vogel (1997: 1407) indicates that while the OECD Commentary only in 1977 inserted the commentary regarding automatic and spontaneous exchanges of information, State practice was to concur with the clarification reference in the OECD Commentary and apply such exchanges.

[360] 1977 OECD Commentary on Article 26 paragraph 13

[361] Vogel (1997: 1411)

information is the exchange of tax information especially concerning a whole economic sector (e.g. the oil or pharmaceutical industry, the banking sector, etc.) and not taxpayers in particular".[362] The focus on the banking sector lead to further amendments to the Model and the Commentary in 2005. However, of practical significance to the purpose of the sportsperson article is that States could agree to share information on the sports industry / sector thereby providing a solution to a category of taxpayers and industry previously considered to be fraught with evasion.

It is submitted, however, that exchange of information can only effectively support the residence principle where it is supported by assistance in the collection of taxes. The 2003 OECD Model introduced Article 27 – Assistance in the Collection of Taxes into the Model Convention. The introduction of this article was partially as a result of the efforts of the OECD and EU with the introduction in 1979 of the "Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims" as discussed in the 2000 OECD Model.

The exchange of information article in the DTAs with New Zealand and Belarus are based on the 2000 OECD Model. 12 South African DTAs exchange of information articles have been based on the 2003 OECD Model. Of these 4 include extracts of the 2001 UN Model as well.

6.5.4. 2005 and 2008 OECD Models

Many of the changes (as indicated from the OECD Commentary extract in 6.4.1 above) were inserted to indicate current State practices. In addition, the bulk of the changes pertained to the OECDs pursuit of tax havens and the encouragement for such havens to enter into exchange of information agreements. The tax haven issue was largely related to the retention of information by financial institutions, but avoidance techniques of relocating profits to a low tax jurisdiction prompted the introduction of the entity paragraph in the sportsperson article.

Such triangular situations are, it is submitted, not resolved by all exchange of information articles. The reason is provided in the 2005 / 2008 OECD Commentary:

> "The information received by a Contracting State may not be disclosed to a third country unless there is an express provision in the bilateral treaty between the Contracting States allowing such disclosure".[363]

[362] 2000 OECD Commentary on Article 26 paragraph 9.1

[363] 2008 OECD Commentary on Article 26 paragraph 12.2

None of the South African DTAs include such a deviation from the OECD Model article wording to permit such on-disclosure to a third State. Of course, on-disclosure must be permissible where the information has appeared in court proceedings or judicial decisions that have been publically reported. However, this limitation is a severe constraint on preventing tax evasion by means of the exchange of information article. As this limitation represents a clarification of previous OECD Model and Commentary versions, it applies to the DTAs concluded earlier.[364]

Triangular situations are overcome where, for example, State A (the requesting State) has DTAs with both States involved in the transaction. If the information from State B (the performance State) indicates a transactional flow to State C (the third State), then State A could request information directly from State C. State A cannot, however, obtain information from State C via State B. While the entity paragraph remains, the right to tax the third party in the performance State immediately overcomes (at least to some extent) the effects of any evasion tactics employed through the use of such an entity (see 5.6.2.6 above).

Both the DTA with Australian and the new DTA with the Netherlands (effective from 1 January 2009) have been amended by Protocol to include (amongst other amendments) the latest exchange of information article (i.e. based on the 2005 and 2008 OECD Models).

6.6. SOUTH AFRICAN DTA EXCHANGE OF INFORMATION ARTICLES

As discussed in Chapter 2 (see 2.4.4), the OECD Commentary at the time the DTA was entered into can be used for interpretation of the DTA text. Later commentaries can only be used where such commentary reflects a clarification, but where the meaning is modified, such commentaries offer little assistance.

The South African courts would use the ordinary meaning of the words as the primary means of interpretation with the commentary providing assistance or clarity as to the context.

It is proposed in Chapter 5 that the sportsperson article is too specific and should either be deleted or replaced with an article aimed at all mobile workers. However, the original

[364] See similar conclusion reached by Vogel (1997: 1413) based on the 1977 OECD Model (as amended in 1992 and 1995).

premise for introducing the sportsperson article was to prevent fiscal evasion through non-disclosure in the residence State of income earned in the source State from performance in that State (see 5.2). It is submitted in this thesis that such purpose can be achieved through effective exchanges of information, negating the original purpose of the sportsperson article. As effective exchange of information could spell the end of the sportsperson article, it is necessary to analyse the use and scope of the exchange of information article in South African DTAs.

6.6.1. South African domestic law pertaining to exchange of information

Section 108 of the South African ITA (see Appendix B) permits the Government to enter into agreements pertaining (in part or exclusively) to "the rendering of *reciprocal* assistance in the administration of and the collections of the taxes under the said laws of the Republic *and of such other country*" (*emphasis added*). Such a provision carries the implication that the administrative functions available may be used for information gathering for another State, even where the information does not pertain to any South African tax. Based on the principle of reciprocity, the States are obliged to exchange information "in comparable circumstances and to a comparable extent".[365]

In addition, most DTAs require that the secrecy requirements of the requested State must be applied to the information received by the requested State. In this regard, section 108(4) provides:

> "The duty imposed by any law to preserve secrecy with regard to such tax *shall not prevent* the disclosure to any authorised officer of the country contemplated in subsection (1), of the facts, knowledge of which is necessary to enable it to be determined whether immunity, exemption or relief ought to be given or *which it is necessary to disclose in order to render or receive assistance* in accordance with the arrangements notified in terms of subsection (2)" (*emphasis added*).

Where the DTA indicates that exchanges of information may pertain to domestic taxes levied by the other State and not covered by the DTA, such exchange of information provision is empowered within the South African ITA by the text italicised in section 108(4) above. It is submitted that the release to the "authorised officer" then further permits the use of the information by that officer as detailed in the exchange of information article (i.e. in court proceedings and to other persons concerned with the assessment, collection, enforcement or prosecution of taxes in that State).

[365] Vogel (1997: 1406)

Without the enabling provisions of section 108 of the South African ITA, the exchange of information articles could have had severe limitations in scope and application in South Africa.

6.6.2. The effect on South African income tax of deletion of the sportsperson article from South African DTAs

Should the sportsperson article be deleted from all the South African DTAs the taxing right for short stay performances of sportspersons would generally apply only to the residence State.[366] In such a case, the withholding tax could not be levied on such sportspersons. That is not to say that the withholding tax legislation itself should be deleted from the South African ITA. Rather the withholding tax serves an important function where sportspersons from non-DTA States perform in South Africa.[367]

The global aim of tax administrations to prevent evasion through non-disclosure by residents of foreign source income is rendered ineffective where the residence State and the source State have not concluded a bilateral treaty including the exchange of information article or a separate treaty concerning assistance in administrative matters. Withholding taxes serve this global purpose by ensuring that the income is taxed at least once.

Pocock (2001) indicates that the residence principle can only be effectively supported by appropriate exchanges of information (which ensures that the right person is taxed on the right amount in the right State). Where such exchange of information cannot be effectively facilitated, withholding taxes (while not a perfect system for support of the residence principle) are a necessary substitute.[368]

[366] Through the application of the Income from Employment article providing the taxing right exclusively to the residence State in the case of short stay performance.

[367] Bird *et al* (2008: 799): "Withholding […] serves the two-fold purpose of helping to identify potential taxpayers and ensuring that at least a part of the tax is realised at source, thereby minimizing risk as well as delay in payment".

[368] High level withholding taxes are included as one of three recommendations at a domestic tax level in the 1987 OECD Report (1987: paragraph 105(a)). The others included removal of exemptions for sportspersons (as there was unequal treatment between various states) and the creation of "an effective and comprehensive information-gathering system".

The purpose of the sportsperson article was the prevention of fiscal evasion by sportspersons (as highly mobile persons). Effective exchange of information (as permitted by DTAs) can effectively serve this purpose and render the sportsperson article unnecessary.

One of the recommendations at a domestic level in the 1987 OECD Report was that States should set up "an effective and comprehensive information-gathering system". In addition, the 1987 OECD Report provides: "[s]etting up specific units for this purpose [information-gathering] would facilitate centralising the information available *and communicating with foreign partners*".[369] The information gathering system on sportspersons' performances in South Africa is already running.[370] Part of the withholding tax requirements is early disclosure by South African organisers of sporting events and the persons performing (see 3.3.4.3 above). If this information is gathered in the ordinary course of the tax administration in South Africa, it is submitted that such information is available for automatic exchange (or spontaneous exchange) with DTA States. Such information exchange prevents fiscal evasion and supports the residence principle. Removal of the sportsperson article is therefore supported by these factors.

The Netherlands has abolished taxation on sportspersons in the Netherlands for sportspersons from States with which the Netherlands has a DTA (see 5.8.2 above). This abolition of this tax was motivated by the Dutch Governments view that the administrative burden outweighed the tax revenue.

Deletion of the sportsperson article from South African DTAs may also remove the South African need for the collection of the information. The deletion of the sportsperson article would place most sportspersons in the "short stay" category for the Income from Employment article and similarly, such persons are unlikely to have permanent establishments in South Africa resulting in exclusive taxing rights being allocated to the residence State.[371] With no right to tax the income for sportspersons' performances, the South African government would

[369] OECD (1987: paragraph 105(b))

[370] SARS has identified selected individuals for non-resident entertainers and sportspersons to contact at SARS (refer SARS website at http://www.sars.gov.za.

[371] It is submitted that these principles are correct based on the benefit principle – see Holmes (2007).

have no particular need for the information (other than to supply such information to DTA States in terms of the exchange of information article).[372]

Reluctance to gather such information may be overcome if the administrative burden of disclosing the sporting event rests on the organisers (and subjecting non-disclosure to penalties). Such shift of administrative burden would mitigate the cost of information gathering while supporting the exchange of information principles. The Dutch government may have been motivated by the removal of the administrative burden, but were quick to clarify that the tax still applied to non-treaty States' sportspersons performing in the Netherlands. If concern remains that the collection of the data of sportspersons performing in the source State will result in costs that cannot be recovered, perhaps an agreed level of withholding tax would provide the solution.

Under such a system, the source State levies a nominal withholding tax and exchanges information as to the amounts paid to the sportsperson to such sportsperson's residence State. Such a tax recognises the use of the source State's administrative functions. It is submitted that such a system actively supports the residence principle perhaps not cleanly, but practically.

Support for the taxes levied in the residence State can also be found in assistance in the collection of taxes articles. Such collections are supported by domestic legislation in South Africa (provided a DTA has been entered into permitting such collection[373]).

[372] An example in the reverse is supplied in the 2008 OECD Commentary on Article 26 (paragraph 7(e)), namely: "When applying Articles 15 and 23A, State A, where the employee is resident, informs State B, where the employment is exercised for more than 183 days, of the amount exempted from taxation in State A". It is submitted that the example could equally be State B (the source State) informing State A of the performance of the taxpayer in State B and that such performance pertains to a period of less than 183 days (and thus is only subject to tax in State A) as well as the amount paid to the taxpayer for performance in State B. This is the anticipated communication for sportspersons performing in South Africa in the absence of the sportsperson article (for employed sportspersons).

[373] Through the inclusion of an article akin to the Article 27 (Assistance in the Collection of Taxes) in the OECD Model

6.6.3. Sufficiency of exchange of information scope to facilitate deletion of the sportsperson article from South African DTAs

It is submitted that the exchange of information by request relies on the requesting State to have exhausted its administrative methods before requesting such information.[374] For the deletion of the sportsperson article to be supported by the exchange of information between States, automatic or spontaneous exchanges of information are required i.e. the States, when negotiating the DTA (or by mutual agreement), agree the information to be exchanged automatically; or the source State volunteers the information concerning sportspersons performing in South Africa to the residence State of that sportsperson.[375]

Automatic exchanges would, to some extent, ensure a level of reciprocity in information exchanged and would, it is submitted, be more successful than reliance on spontaneous exchange. The information to be exchanged would have to be agreed between the two States.

The greatest difficulty in placing reliance on the exchange of information article to achieve effective taxation in the residence State in the absence of the sportsperson article is submitted to be the multi-lateral effects, such as in triangular transactions. To achieve a scope similar to that of the sportsperson article, the residence State would have to have DTAs with both the source State (performance State) and the third State (in which, say, the sportsperson routes income through the use of a legal entity). Such difficulties could be overcome if the exchange of information article permitted the on-disclosure of information gathered by the source State on to the residence State.

In addition, should the sportsperson article be deleted, DTAs would have to include the full scope of the 2008 OECD Model exchange of information article's paragraph 1. This would ensure scope to pursue information pertaining to domestic taxes of the residence State as well as other States irrespective of application of the Convention to such taxes. Furthermore, it is recommended that the extract from the UN Model pertaining to the prevention of fraud and fiscal evasion (and, it is submitted legal avoidance to ensure full scope) be inserted into the exchange of information article. This would facilitate exchanges of information on the use of entities by sportspersons receiving payment in the source State.

[374] Vogel (1997: 1406)

[375] See also the 1987 OECD Report at paragraph 107 (discussed and reproduced in 6.2.1 above).

While the current scope of the exchange of information article may not yet be sufficient to prevent the evasion anticipated by the sportsperson article, such scope can be amended by protocol (should the DTA wording require adjustment) or mutual agreement (if the States believe the wording to be sufficient). However, other limitations may be too great to overcome.

6.6.4. Limitations and practical difficulties

Reliance on the exchange of information article to supplant the sportsperson article presupposes a number of conditions as having been met, in particular: administrative and technological ability of the source State to obtain and transmit such information and, the ability of the residence State to use the information received (such as associating the information received with the particular taxpayer).

Some States are working on solutions to these issues. The OECD (2006a: 22) provide:

> "In 1997, the OECD Council adopted a Recommendation on the use of TINs [Tax Identification Numbers] in the international context (C(1997)39/FINAL). TINs are used to identify taxpayers and are a *key to automated matching programs*. The knowledge of TINs can be useful for processing information received automatically from a treaty partner. The provision of TINs is also important when either making or answering a request or providing information spontaneously since it will facilitate the quick identification of the taxpayer. Consequently when the provision of TINs is legally possible field tax officials should provide them to their competent authority when making a request or transmitting information (both source country and residence country TINs, if known)" (*emphasis added*).

In addition, there must be some form of protection of the taxpayers' data in terms of secrecy and the right to privacy. Many constitutional rights may be impacted by a government's decision to share information. Moreover there may be incompatibility between the States legal systems, for example Japan's observation to the 2008 OECD Commentary that: "it would be difficult for Japan, in view of its strict domestic laws and administrative practice as to the procedure to make public the information obtained under the domestic laws, to provide information requested unless a requesting State has comparable domestic laws and administrative practice […]".[376]

[376] 2008 OECD Commentary on Article 26 paragraph 20

The inconsistency in exchange of information articles in South African DTAs could also limit consistent exchanges between States.[377]

6.7. CONCLUSIONS

The current scope of the exchange of information article is submitted to largely cover the original purpose for the introduction of the sportsperson article (namely the prevention of evasion by sportspersons as highly mobile individuals). However, practical considerations (such as the ability to exchange information) and limiting factors (such as incompatible legal systems) prevents the use of the exchange of information article as a replacement to the sportsperson article.

However, it is submitted that the sportsperson article does not eliminate tax evasion by sportspersons. Effective and efficient exchange of information is still necessary to ensure that the right person is taxed appropriately in the correct State (irrespective of the State in which the actual tax is levied).

While exchange of information is not at a stage where it could supplant the sportsperson article, this does not take anything away from the conclusions in chapter 5 that the article is inappropriately specific and should be deleted for that reason or at least replaced with an article aimed at all mobile workers. If anything, the absence of exchange of information concerning other mobile workers or trade by organisations deemed not to have a permanent establishment in the source State results in a greater likelihood of tax evasion in those areas than taxation of sportspersons.

[377] Refer Appendices I – L.

CHAPTER 7

THE SOUTH AFRICAN TAX IMPLICATIONS FOR SPORTSPERSONS OF THE 2010 FIFA WORLD CUP

7.1. INTRODUCTION

"As part of the bid to host the 2010 FIFA World Cup, the South African Government issued various guarantees to FIFA. […] Following the award of the 2010 FIFA World Cup to South Africa, representatives of Government, FIFA and the Local Organising Committee met to clarify the intent and scope of these […] guarantees […]".[378]

In terms of the legislation promulgated ("the FIFA legislation"),[379] numerous tax concessions (not all of which have a bearing on sportspersons) have been granted to FIFA, FIFA Affiliates and other bodies. This chapter only examines those aspects of the introduced legislation as are applicable to the income tax to be levied on sportspersons (including support staff).[380]

To avoid confusion with terms already discussed in this thesis, terms defined in the FIFA legislation will be italicised in the text and the defined terms relevant to this chapter are reproduced in 7.2 below.

7.2. DEFINITIONS APPLICABLE TO FIFA LEGISLATION

The following defined terms have been extracted from the FIFA Legislation and are used throughout this chapter with the meanings below. Where used, the terms have been italicised to distinguish from an ordinary meaning or a term used previously in this thesis.

" […]

[378] Explanatory Memorandum to the Revenue Laws Amendment Bill, 2006 at 46

[379] Clause 106 introduced as "Schedule 1 – Special Tax Measures relating to 2010 FIFA World Cup South Africa" in the Revenue Laws Amendment Act 20 of 2006.

[380] Other concessions granted in terms of guarantees issued to FIFA by the South African Government but not having any bearing on sportspersons include: Zero-rating of certain taxable supplies for VAT; exemption from import and custom duties for certain goods in particular circumstances; creation of "tax-free" trading zones around the stadiums; and others. As these exclusions have no bearing on sportspersons, such concessions fall outside the scope of this thesis.

'Championship' means all matches and ceremonies of the 2009 *FIFA Confederations* Cup and the 2010 FIFA World Cup and such other directly related official events, including draws, galas, conferences and cultural events, as may be agreed in good faith between *FIFA* and the *Commissioner*;

'Championship duration' means with respect to the 2009 *FIFA Confederations* Cup and the 2010 FIFA World Cup respectively, the period commencing one week prior to the opening ceremony and terminating immediately after the closing ceremony;

'Championship site' means –

(a) any official *FIFA* stadium and the entire premises of such a stadium inside the perimeter fence and the aerial space above such stadium premises;

[…]

(d) any training sites (other than sites contemplated in paragraph *(a)*), being any venues selected to host any official *Championship*-related training sessions for the *team* of any *Participating National Association* in the *Republic*;

[…]

'FIFA' means the Fédération Internationale de Football Association (FIFA);

'FIFA Confederations' means the continental confederations officially affiliated to *FIFA* being the AFC, OFC, UEFA, Conmebal and Concacaf;

[…]

'Participating National Association' means any National Association affiliated to *FIFA*, qualified to enter a *team* in the final tournament of the *Championship* and any representative of the National Association excluding any member of the *team*;

[…]

'team' means any team representing a *Participating National Association* which has qualified to participate in the *Championship* and includes all squad members, coaches as stipulated in the *Championship* regulations, medical personnel and other auxiliary staff;

[…]".[381]

7.3. APPLICATION OF THE FIFA LEGISLATION TO SPORTSPERSONS AND ENTITIES

7.3.1. Exemptions for the *Participating National Associations*

Paragraph 3 of the FIFA Legislation provides for sweeping exemptions in favour of *FIFA*, FIFA subsidiaries and the *Participating National Associations*.[382] In the first instance, these bodies are exempt from "all taxes, duties, levies and other amounts which may be imposed in

[381] Paragraph 1(1) of Clause 106 in the Revenue Laws Amendment Act 20 of 2006

[382] Examples of *Participating National Associations* include: Deutscher Fussball-Bund (Football Association of Germany); Confederaçao Brasileira de Futebol (Football Confederation of Brazil); Botswana Football Association; etc. This demonstrates that each team represents a State that either has negotiated a DTA with South Africa (see Appendix G) or would be in a position to do so should the respective governments so decide.

terms of any Act administered by the *Commissioner*".[383] This exemption includes all taxes levied in terms of the Income Tax Act.

In addition, these bodies will be "deemed not to have a permanent establishment in the *Republic* by virtue of any activities carried on in the *Republic* which relate to the *Championship*".[384]

Finally, "[a] person who is liable to pay any amount to an entity contemplated in paragraph 2,[385] is not required to withhold any amount from that payment in terms of section 35, 35A or Part IIIA of Chapter II of the *Income Tax Act, 1962*".[386]

There are a number of implications of these exemption concessions. Each is discussed below.

7.3.1.1. No permanent establishment

For the purposes of the *FIFA Confederations* Cup in 2009 the Participating National Associations fielding teams (other than South Africa) are Brazil, Egypt, Iraq, Italy, New Zealand, Spain and the United States.[387] Of these States, South Africa has DTAs in place with all but Iraq.

The teams for the 2010 World Cup have not yet been drawn as qualifying matches are still being played. It is however certain that a maximum of 5 teams will be drawn from Africa, 5 teams from Asia, 13 teams from Europe, 4 teams from North and Central America and the Caribbean, 1 team from Oceania, and 5 teams from South America. In total 32 teams will participate in the tournament. Many of the States that potentially could participate in the *FIFA* World Cup in 2010 do not have DTAs with South Africa (refer to Appendix G).

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[383] Paragraph 3(1)(a) of Clause 106 in the Revenue Laws Amendment Act 20 of 2006. Note however that paragraph 3(3) excludes certain taxes from the blanket exemption, none of which impact this thesis.

[384] Paragraph 3(1)(b) of Clause 106 in the Revenue Laws Amendment Act 20 of 2006

[385] Paragraph 2 refers to *FIFA*, the FIFA subsidiaries and the *Participating National Associations*.

[386] Section 35 concerns a final withholding tax on royalties paid to non-residents; section 35A a withholding tax on disposal of immovable property in South Africa by a non-resident; and Part IIIA refers to the provisions related to the withholding tax on sportspersons.

[387] Sourced from http://www.fifa.com/confederationscup/teams/index.html

By deeming *FIFA*, its subsidiaries and the *Participating National Associations* not to have permanent establishments in South Africa renders the Business Profits article of all the South African DTAs with the relevant States inapplicable. As a result, only the residence State will have the right to tax such bodies. In addition, certain domestic law provisions are not effective. For example, the deeming source provision for capital gains of a permanent establishment in South Africa will not be effective.

Critical to the application of this exemption is that the permanent establishment will only be deemed not to exist in relation to activities of the *Championship*. This implies that if a causal link between the income earned and the *Championship* does not exist, a permanent establishment could be said to exist (if such activities meet the definition for "permanent establishment" in the South African ITA).[388]

7.3.1.2. Exempt from taxes, duties and levies including application of withholding taxes

Any amounts paid to *FIFA*, its subsidiaries or the *Participating National Associations* by any person, irrespective of the application of South African source principles, is exempt from taxation in South Africa. No normal tax can be levied on any income (including taxable capital gains) earned by such bodies from a South African source.

This exemption is far reaching as amounts paid to a *Participating National Association*, for example, to fund the payments to the *team* members cannot be subject to the South African withholding tax on sportspersons (where applied to amounts received by another non-resident person for the sportspersons performance exercised or to be exercised in South Africa). This is despite a right to tax such amounts granted by the entity paragraph in the sportsperson article of the DTAs (see 5.6.2 above).

In addition, no withholding taxes can be applied to royalties paid to such bodies from use in South Africa of any patented processes or technical know-how etc. Also disposal of South African immovable property will not be subject to the withholding taxes where such transaction is undertaken by such bodies.

[388] "Permanent establishment is defined in the South African ITA as "a permanent establishment as defined from time to time in Article 5 of the Model Tax Convention on Income and on Capital of the Organisation for Economic Co-Operation and Development".

7.3.1.3. Freedom from administrative functions in terms of the South African ITA

It is submitted that while no duty to withhold tax is imposed on persons (whether resident or not) making payments to the *Participating National Associations*, the duty to withhold South African income tax on payments by such associations to sportspersons for activities exercised or to be exercised in South Africa remains on such associations. This means where such associations pay its *team* members for their performance in South Africa, the association will remain responsible for withholding the 15% flat tax on the gross amount for payments to the sportspersons (contemplated in the DTAs as regards scope and income).

7.3.2. Exemptions for Individuals – are sportspersons included?

Paragraph 10 of the FIFA Legislation exempts from "gross income" the receipts and accruals of natural persons (contemplated in paragraph 9(1) of the FIFA Legislation) derived from the activities connected with the *Championship*.

The natural persons identified in paragraph 9(1) (as is relevant to this thesis) are "*Championship* referees or assistant referees" and "an official of any *Participating National Association* (other than officials of *SAFA*)". However, paragraph 9(2) excludes from the scope of paragraph 9(1) "members of a *team*". Therefore, while the receipts and accruals pertaining to the *Championship* of the respective management officials representing the *Participating National Associations* and the referees are exempt from South African income tax, the "squad members, coaches as stipulated in the *Championship* regulations, medical personnel and other auxiliary staff" (defined as *team* members) do not receive such exemption.

As was demonstrated in 3.2.2 above, the withholding tax for sportspersons is sufficiently broad in scope to contemplate all the persons defined as members of a *team* for the *Participating National Associations*. Even medical and auxiliary staff fall within the ambit of "sportsperson" in terms of the domestic legislation. However, the Explanatory Memorandum (2006: 51) that accompanied the Bill introducing the FIFA Legislation states: "Withholding taxes are to be levied in respect of non-resident Team members *in accordance with international practice*" (*emphasis added*).

It is submitted that this reference in the Explanatory Memorandum should carry some weight in the South African courts.[389] It is clear from the analysis in 5.3.1 and 5.4 that the international understanding of "sportsperson" differs from the South African ITA meaning. The international view has a much narrower scope clearly excluding support staff and coaches from the meaning. With reference to the FIFA Legislation definition for *team* and the above limitation to "international practice", only the "squad members" should be subject to withholding tax. If this represents the intention of the legislators, the remaining persons (not being exempt from tax in South Africa in terms of the domestic legislation[390] and in the absence of the short stay exemption contained in the Income from Employment article) would be subject to normal tax rather than withholding tax (despite the scope of the domestic withholding tax being sufficiently broad to consider such persons).

As the coaches, medical personnel and auxiliary staff (excluded from the scope of the sportsperson article) are likely to be employed by the *Participating National Associations* they are classified as employees. However, paragraph 5 of the FIFA Legislation makes it clear that the *Participating National Associations* are not required to register as employers for the purposes of deducting employees tax from its employees. The result is that the coaches, medical personnel and auxiliary staff (in the absence of any DTA relief) will have to register as provisional taxpayers in South Africa in their own right for normal income tax purposes. They will have to submit two provisional tax payments in respect of each year of assessment and be assessed on an annual basis having submitted the requisite annual return for income tax.

For those States with which South Africa has a DTA, the coaches, medical personnel and auxiliary staff defined as *team* members would generally find relief in the Income from Employment article of the DTA. The 2008 OECD Model prevents the source State from taxing income from employment where:

(a) the person earning such income from employment is present in the source State for a period or periods in aggregate of less than 183 days in the year of assessment;

[389] See Botha, C. 2005. Chapter 7: Research: Ascertaining the legislative scheme (the purpose of legislation). (*In* Botha, C., *Statutory Interpretation: An Introduction for Students.* Juta & Company: South Africa, p87.) in which it was shown that the South African courts have previously relied on Explanatory Memoranda to interpret the legislation.

[390] Being members of the "team" as defined.

(b) the income from employment must be paid by an employer not resident in the source State; and

(c) the remuneration must not be borne by a permanent establishment of the non-resident employer in the source State.[391]

As the *Participating National Associations* are not resident in South African for income tax purposes and have been deemed (by the FIFA Legislation) to not have a permanent establishment in South Africa for activities related to the *Championship*, it would appear as though conditions (b) and (c) above are met. All that remains to be met by the *team* members excluded from the withholding tax application is the stay in South Africa of less than 183 days in the relevant year of assessment.

For States that have not concluded a DTA with South Africa, the coaches, medical personnel and auxiliary staff will be subject to normal income tax in South Africa without DTA relief. Such persons may qualify for any unilateral relief offered by their residence State.

7.4. DTA EXEMPTION

Many of the established football nations central organisations / associations are self-funding. Funds are generated through club membership subscriptions, ticket sales, sales of broadcasting rights, licence fees (for use of trademarks etc) and merchandise sales.[392] Such associations do not require State funding to survive or to sponsor the national team.

However, a different picture can emerge when examining the position of developing football nations. For example, the Thai national team was largely created and funded by the Thai Government to build up to the World Cup in Germany.[393]

[391] Paragraph 2 of Article 15 – Income from Employment

[392] Examples drawn from: 2007. *The FA Report and Financial Statements.* [Online]. Available: http://www.thefa.com/TheFA/~/media/Files/PDF/TheFA/FAReport_FinancialStatements2007.ashx [6 April 2009]

[393] Sitabutr, S. 2003. *A National Soccer Team Will Be Created with an Initial Budget of 19 Million Baht.* [Online]. Available: http://nntworld.prd.go.th/previewnews.php?news_id=254608130022&news_headline=A%20National%20Soccer%20Team%20Will%20Be%20Created%20with%20an%20Initial%20Budget%20of%2019%20Million%20Baht&return=ok [6 April 2009]

For those national teams funded in the majority by public (Government) funds, if those States have a DTA with South Africa and such DTA contains the OECD optional "public funds" clause, the South African right to tax such sportspersons in terms of the sportsperson article may be removed (see 5.7.1 above).

7.5. CONCLUSIONS

For nations participating in the FIFA World Cup in South African in 2010, it appears that such States will need to obtain clarity from the South African Government as to the application of the FIFA Legislation on natural and non-natural persons and the interaction with any applicable DTA.

The FIFA Legislation (read with the Explanatory Memorandum) appears to offer inconsistency. The inclusion of medical personnel, coaches and auxiliary staff in the term "*team*" in the FIFA Legislation appears to have the intent to include such persons within the ambit of the South African withholding tax on sportspersons. While such application is submitted to be correct in terms of the South African legislation, such inclusion is inconsistent with the international understanding and practice. The Explanatory Memorandum refers to the intent to apply the withholding tax regime in terms of international practice. The result is a different tax treatment for natural persons acting as medical personnel, coaching staff or auxiliary staff than the treatment for the squad members (sportspersons).

The *Participating National Associations* while exempt from South African taxes, duties and levies do not appear to be exempt from the responsibility of withholding taxes on amounts paid to the squad members in the *team* for their performance in South Africa. Should such associations not be responsible for such payments, any other person (whether resident or non-resident) must withhold the requisite tax. The associations are certainly not made aware of this responsibility in the FIFA Legislation (albeit that the responsibility is clear from the domestic legislation).

Some States may have exclusive right to tax their sportspersons (those falling within the ambit of the international practice for the interpretation of the sportsperson article terms) should such *Participating National Associations* (and thereby the *teams*) be wholly or mainly supported by public funds.

It is submitted that two courses of action are available in DTAs to resolve the inconsistencies. Either the Contracting States need to exchange the necessary information (in terms of the Exchange of Information Article) to agree on the scope and use of the sportsperson article, or the *Participating National Associations* should initiate mutual agreement procedures (in terms of the Mutual Agreement Procedures Article) between the Contracting States.

For Contracting States that have DTAs with South Africa that do not contain one or both of the above articles as well as those States that do not have DTAs with South Africa, it is submitted that the South African Government should clarify the position with each of those States and in addition should remove the inconsistencies currently present in the FIFA Legislation.

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

8.1. INTRODUCTION

This thesis aimed to answer a number of questions regarding the taxation of income earned by international (non-resident) sportspersons performing in South Africa.

Firstly, the question is asked whether the withholding tax on sportspersons (introduced with effect from 1 August 2006) was necessary and appropriate in terms of: (a) the persons to be taxed; (b) the income to be taxed; (c) the amount of tax to be levied; and (d) method of collection.

Secondly, accepting the withholding tax as currently contained in the South African ITA (irrespective of its necessity or appropriateness), the answer to how well the South African withholding tax on sportspersons aligns with the sportsperson article in the South African DTA network is sought.

Thirdly, the sportsperson article was examined to determine whether the article remained relevant and necessary in DTAs. In this context, it was also postulated whether effective exchange of information between States would negate the original purpose of the sportsperson article, thereby promoting the call for its deletion.

Finally, with the 2009 FIFA Confederations Cup about to start in South Africa (at time of writing) and the 2010 FIFA World Cup mere months away, the concessionary legislation introduced at FIFA's behest is examined in the context of the taxation of sportspersons. The question to be answered is whether the FIFA Legislation will be beneficial or detrimental to the taxation of sportspersons (i.e. whether it aligned with the DTAs and the South African withholding tax on sportspersons).

Within and around each of these core issues, further questions are examined. The issues, conclusions and recommendations arising from the preceding chapters are analysed below.

8.2. BACKGROUND AND INTERPRETATIONAL CONSIDERATIONS

Chapter 2, after providing some background to the South African tax system, sets out to provide the interpretational tools necessary to analyse the withholding tax on sportspersons. The interpretational mechanisms provided in that chapter provide the methodological approach to analysing the withholding tax.

The intention of the Legislature is of paramount importance in interpreting fiscal legislation in South Africa. Such intention is derived from the plain language used. The ordinary meaning of the words in their context is examined. Where the result of the language used provides an absurd result, the language in the legislation is altered to provide the intended effect. Where two equal interpretations to the language are derived, the fiscal legislation is interpreted *contra fiscum*.

Certain terms or phrases used in the ITA carry the same meaning (either by definition or reported case law), but this is not always the case (see 2.3.1 and 2.3.5 above). The use of a phrase must therefore be carefully considered by the legislators.

Foreign judicial precedent and other foreign sources may carry persuasive value in the South African courts if it can be shown that the legislation (or article) is derived from such foreign source. In addition, customary international law is overriding (and protected by the South African Constitution).

As the South African DTAs are given effect by section 108 of the ITA, their status is equal to that of the other provisions within the ITA. This not only can create conflict between domestic provisions and a DTA but also places the DTA network within the jurisdiction of the South African courts. This renders all of the above interpretational methodology relevant to the interpretation of DTA articles.

Chapter 2 considers the status of the OECD Commentary for the purposes of interpreting South African DTAs. The conclusion derived is that the OECD Commentary may be used as an interpretational tool in terms of customary international law and may assist in the interpretation of the context. However, judges of South African courts will first determine the meaning of the article from the text and the purpose of the DTA before referring to the OECD Commentary. In addition, it is concluded that later OECD Commentaries do have interpretational value for DTAs concluded earlier, but only where such later commentaries

provide clarity to an earlier issue or reflect advances in business that would not have been in the minds of the negotiators (and can be contemplated within the original text of the DTA article).

With the methodological approach to interpreting the domestic fiscal legislation and DTA articles established, the core research questions are examined.

8.3. SOUTH AFRICAN WITHHOLDING TAX ON SPORTSPERSONS

The focus of chapter 3 was to assess the necessity and appropriateness of the introduction of the withholding tax on sportspersons to the South African ITA. Reasons for the introduction of a new tax can include (but are not limited to): (a) inefficiency in the administration and collection of the tax previously; (b) insufficient tax collected from a particular type of taxpayer; or (c) the desire to tax a group previously untaxed. The reason for the introduction of the withholding tax on sportspersons in South Africa was as a result of inefficiencies in the collection of taxes owed in South Africa, largely as a result of the short period of stay of the sportspersons in South Africa.

To adequately assess the previous system of taxation of sportspersons against the new withholding tax, a number of issues were analysed. Firstly the scope of the term "sportsperson" was examined and found to be far reaching. Secondly the scope of income contemplated within the withholding tax regime was found to be very narrow and isolated to only certain of the activities of the sportsperson. The income not contemplated within the withholding tax regime thus remains subject to normal tax (the previous system) resulting in no change in efficiencies of collection.

The withholding tax system levies tax at a flat rate of 15% on the gross receipts of the sportsperson. This rate was compared against the progressive rates applicable to normal tax on net receipts (using varying levels for deductions). The result was that for sportspersons with deductible expenditure of greater than 62.5%[394] for natural persons and 54.55%[395] for

[394] Proven as follows (where *x* represents R1 of income; *y* represents R1 of deductible expenditure; 15% is the flat rate on gross earnings for withholdings tax purposes and 40% is the maximum marginal rate applicable to natural persons on the progressive tax tables):

foreign branches, the withholding tax levied is always greater than tax levied per the progressive table. With lower expenditure there are intersection points at varying levels of income.

Where the sportsperson has few deductible expenses, it would appear that the flat rate of 15% is beneficial to the sportsperson. Clearly Government have sacrificed revenue on such sportspersons in exchange for a system aimed at better collection.

While the method of collection may have changed (and SARS are able to receive advance notification of sporting events), it is submitted that the same opportunities for tax evasion remain. The withholding tax system places the onus on the non-resident sportsperson (in the absence of a resident payer) to pay the relevant tax to SARS. The normal tax system places the onus on the sportsperson to file a return and the burden of early collection on a resident "employer". Placing the onus on the non-resident sportsperson under either system retains the tax evasion opportunity of non-disclosure of earnings (both for the source State and the residence State). It is therefore submitted that the new withholding tax is no more efficient than normal tax. Little value appears to have been added by the introduction of the withholding tax on sportspersons.

The withholding tax on sportspersons must also operate within the South African DTA network. As the DTAs carry an effective override over the domestic legislation, misalignment between the domestic legislation and the application of the DTA can create difficulties. These issues are examined in chapters 4 to 6.

$\text{If}: 15\%x = 40\%(x - y)$

$\text{Then}: 15\%x = 40\%x - 40\%y$

$\text{Then}: 40\%y = 25\%x$

$\text{Then}: 160\%y = 100\%x$

$\text{Thus}: y = 62.5\%x$

[395] Proven as follows (where x represents R1 of income; y represents R1 of deductible expenditure; 15% is the flat rate on gross earnings for withholdings tax purposes and 33% is the flat rate applicable to foreign branches on net amounts):

$\text{If}: 15\%x = 33\%(x - y)$

$\text{Then}: 15\%x = 33\%x - 33\%y$

$\text{Then}: 33\%y = 18\%x$

$\text{Thus}: y = 54.55\%x$

8.4. SOUTH AFRICAN DTA IMPLICATIONS FOR SPORTSPERSONS

The withholding tax on sportspersons is a new tax introduced to the ITA. The question answered in Chapter 4 was whether the tax fell within the scope of the existing South African DTA network. In summary, as South Africa has historically similar taxes, the withholding tax on sportspersons falls within the scope of the future taxes paragraph. The future taxes paragraph is included in all South African DTAs in force. The withholding tax on sportspersons therefore does not require specific mention in the taxes covered article.

Chapter 5 analysed the sportsperson article contained in the South African DTA network. The analysis comprised two major components, namely: (a) the purpose of the sportsperson article in DTAs and whether the article remains relevant and necessary; and (b) to what extent the withholding tax on sportspersons aligns with the sportsperson article.

8.4.1. The purpose and relevance of the sportsperson article

The purpose in introducing the sportsperson article to DTAs is the prevention of fiscal evasion (and to some extent fiscal avoidance). While the sportsperson article may have had relevance in the past, in "an increasingly borderless world" where "taxpayers can operate relatively unconstrained by national borders", any number of persons are as equally mobile as sportspersons. Yet the right to tax short stay performances of sportspersons remains with the source State whereas short stay performance by, for example, a contract worker remains with the residence State. This inequitable treatment of sportspersons renders the article out-dated. The sportsperson article should either be deleted or replaced with an article applicable to all mobile workers involved in short stay performance. There appears to be no rationale (other than historical) for maintaining the sportsperson article in DTAs currently in force.

Irrespective of the inclusion of the sportsperson article, fiscal evasion remains a possibility. Readily available information for exchange purposes with Contracting States could make significant inroads in the prevention of fiscal evasion. However, it is submitted (see Chapter 6) that exchange of information has not yet been negotiated sufficiently, or reached levels of automatic exchange required to supplant withholding taxes. While withholding taxes still have a purpose in the prevention of fiscal evasion, it is submitted that the sportsperson article remains inappropriate as the treatment of these persons differs from that of other mobile workers without justification.

8.4.2. Misalignment between the sportsperson article and the South African withholding tax on sportspersons

The results in chapters 3 and 5 demonstrate significant misalignment between the domestic withholding tax on sportspersons and the scope and application of the sportsperson article in South African DTAs.

8.4.2.1. The sportsperson paragraph and the withholding tax

First considered is the scope of the term "sportsperson". In the domestic context, the term includes not only the sporting competitors, but also the support staff related to the sport (for example: coaches, team doctors; physiotherapists; managers etc.). The term as understood in a DTA context (concluded to be the appropriate interpretation of the term as opposed to the use of the term as domestically defined – refer chapter 2) carries a much narrower scope. "Athletes", "sportsmen" and "sportspersons" in a DTA context refers only to the person performing the sport. All support or auxiliary persons are excluded. The effect is that the sportspersons contemplated in the DTA article would be subject to the withholding tax in South Africa. All the other persons fall within the scope of other DTA articles. Should the short stay provisions of the Income from Employment article apply, or there is no permanent establishment in the case of independent / business services, such persons are taxable only in the State of residence in accordance with the DTA. No South African income tax may therefore be levied on such persons.

This misalignment demonstrates the fundamental flaw in the sportsperson article. The purpose (discussed above in 8.4.1) was the prevention of fiscal evasion. The misalignment between the domestic withholding tax and the DTA sportsperson article (caused by the narrow focus of the sportsperson article) creates the opportunity for fiscal evasion for the persons excluded from the scope of the DTA article who are as mobile as the sportspersons within its scope. This again supports the conclusion that a revised article is required for all mobile workers.

Secondly, the scope of income contemplated in the withholding tax provisions is wider than the income contemplated in the sportsperson article. This misalignment creates two potential difficulties for the international (non-resident) sportsperson, namely that the income falls outside the scope of the sportsperson article and therefore is only taxed in the residence State; or (and particularly for income less directly linked to the sporting performance) falls within the scope of another distributive article for DTA purposes. These misalignments increase the

complexity not only for the sportsperson performing in South Africa, but places a significant (and impractical) onus on the resident payer to determine whether the sportsperson or another DTA article applies to the particular income linked to the sporting performance in South Africa. Even greater difficulty exists for the resident payer and the non-resident sportsperson as regards world-spanning incomes (only portion of which is attributable to the performance in South Africa and therefore such portion falls within the scope of both the withholdings tax regime and the sportsperson article).

8.4.2.2. The entity paragraph and the withholding tax

The most significant criticism of the entity paragraph is that it forms part of an overly specific DTA article. There is no justification for overriding, for example, the Business Profits article where amounts are paid to another person for the performance of a sportsperson in South Africa where a similar result is not obtained for amounts paid to other persons as a result of another type of mobile worker's performance.

A further limitation to the entity paragraph is the exclusion of any income not contemplated within the sportsperson paragraph (i.e. the same misalignment exists as regards income – see 8.4.2.1). In addition, while prevented at a DTA level, the domestic legislation (in circumstances of poorly drafted contracts) could result in both the sportsperson and the entity (other person) both being subject to the South African withholding tax on the same amount.

8.4.3. FIFA legislation and aggravation of the misalignment

The legislation promulgated recently in anticipation of the 2009 FIFA Confederations Cup and the 2010 FIFA World Cup has aggravated the misalignment of the domestic withholding tax with the DTA sportsperson article.

The same misalignment in scope is present in the FIFA legislation, namely that the sporting performers and the support persons are all subject to the withholding tax. However, the FIFA legislation exempts from income tax in South Africa the Participating National Associations. In addition, such associations will be deemed to not have a permanent establishment in South Africa nor will be subject to any of the requirements to withhold employees tax but remain responsible for withholding the tax on sportspersons.

The support persons (not subject to the sportsperson article) would generally be exempt from taxation in South African through the application of the short stay provisions in the Income

from Employment article, or where independent, from Business Profits in the absence of a permanent establishment. Support staff from States that have not concluded a DTA with South Africa would be subject, generally, to the withholdings tax on sportsperson (due to the wide scope of the provision – see 8.4.2.1). Those support staff outside the scope of the domestic definition of "sportsperson" would have to register as provisional taxpayers and pay normal tax (as there is no representative employer to withhold the tax on their behalf).

As South Africa does not have DTAs with the bulk of the potential qualifying States for the 2010 FIFA World Cup (see Appendix G), the potential for double taxation of the sportspersons is significant.

8.5. RECENT DEVELOPMENTS

The European Union has determined in recent decisions from the European Court of Justice ("ECJ") that the application of a final gross withholding tax on a resident of an EU State in another EU State to be discriminatory and against the Four Freedoms as embodied in the EC Treaty. The EU States are therefore compelled to allow all EU sportspersons to be taxed on a net basis in the source EU State.

The Netherlands have decided to not levy any withholding tax on sportspersons performing in the Netherlands that are resident in a State with which the Netherlands has a DTA.

There have been, internationally, significant advances in exchange of information between States (as discussed in Chapter 6).

While the ECJ decisions are not binding on South African courts (or EU courts in the context of a sportsperson from a non-EU State), the international development in exchange of information, the position of the Netherlands as to sportspersons from Contracting States and the advances in exchange of information all point to the result that business and individuals are more mobile than ever before. There appears to be a need to address this mobility in DTAs internationally and to remove the overly specific sportsperson article that has no more relevance in the global village.

8.6. RECOMMENDATIONS

This thesis critically analysed the relevance of the sportsperson article in DTAs currently in force from a South African perspective. It is the opinion of the author (from the above

analysis) that the sportsperson article holds no relevance in current DTAs. Businesses and individuals are all as mobile as sportspersons. The OECD and other international bodies need to consider the more pressing issue of the taxation of all mobile workers[396] instead of encouraging an overly specific article aimed at a group of taxpayers no more mobile or likely to evade taxation as the other mobile workers.

While not discriminatory from a bilateral DTA perspective, the sportsperson article grants the taxing right to the source State which stands in stark contrast to the treatment of other mobile workers. Cognisance should be taken of the developments in the EU and it is recommended to all States that the deletion of the sportsperson article should be prioritised together with reassessment of the taxing rights for source States for all mobile workers.

[396] At time of writing, the 2009 OECD Report on High Net Worth Individuals and Tax Compliance (issued in May 2009), notes in footnote 60 of that report that the OECD Committee of Fiscal Affairs (through Working Party No. 1) are currently reviewing the operation of Article 17. The report is aimed "not on tax policy but on improving compliance within the existing legal framework" (OECD, 2009: 4). It is hoped that the "review" by Working Party No. 1 concerns tax policy and the treatment of all highly mobile workers (in line with the above recommendations) and is not a mere modification of this overly specific article on sportspersons.

APPENDIX A

EXTRACTS FROM THE SOUTH AFRICAN CONSTITUTION

231. International agreements.

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

232. Customary international law.

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

233. Application of international law.

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

APPENDIX B

SECTION 108 OF THE INCOME TAX ACT 58 OF 1962

(1) The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collections of the taxes under the said laws of the Republic and of such other country.

(2) As soon as may be after the approval of Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the *Gazette* and the arrangements so notified shall thereupon have effect as if enacted in this Act.

(3) *Deleted*

(4) *Deleted*

(5) The duty imposed by any law to preserve secrecy with regard to such tax shall not prevent the disclosure to any authorised officer of the country contemplated in subsection (1), of the facts, knowledge of which is necessary to enable it to be determined whether immunity, exemption or relief ought to be given or which it is necessary to disclose in order to render or receive assistance in accordance with the arrangements notified in terms of subsection (2).

APPENDIX C

TABLE OF TREATIES IN FORCE AT 1 JUNE 2008

Number	Country	Date convention concluded	Government Gazette number and date published	Date of Entry Into Force
1	Algeria	28 April 1998	GG No 21303 dd 2000-06-21	12 June 2000
2	Australia	1 July 1999	GG No 20761 dd 1999-12-24	21 December 1999
3	Austria	4 March 1996	GG No 17965 dd 1997-04-30	6 February 1997
4	Belarus	18 September 2002	GG No 25914 dd 2004-01-15	29 December 2003
5	Belgium	1 February 1995	GG No 19437 dd 1998-11-02	9 October 1998
6	Botswana	7 August 2003	GG No 26342 dd 2004-05-12	20 April 2004
7	Brazil	8 November 2003	GG No. 29073 dd 2006-07-28	24 July 2006
8	Bulgaria	29 April 2004	GG No 27517 dd 2005-04-22	27 October 2004
9	Canada	27 November 1995	GG No 17985 dd 1997-05-07	30 April 1997
10	China (People's Republic of)	25 April 2000	GG No 22041 dd 2001-02-02	7 January 2001
11	Croatia	18 November 1996	GG No 18460 dd 1997-11-21	7 November 1997
12	Cyprus	26 November 1997	GG No 19638 dd 1998-12-22	8 December 1998
13	Czech Republic	11 November 1996	GG No 18603 dd 1998-01-07	3 December 1997
14	Denmark	21 June 1995	GG No 16891 dd 1995-12-22	21 December 1995
15	Egypt	26 August 1997	GG No 19706 dd 1999-01-22	16 December 1998
16	Ethiopia	17 March 2004	GG No 28494 dd 2006-02-10	4 January 2006

Number	Country	Date convention concluded	Government Gazette number and date published	Date of Entry Into Force
17	Finland	26 May 1995	GG No 16862 dd 1995-12-01	12 December 1995
18	France	8 November 1993	GG No 16681 dd 1995-09-27	1 November 1995
19	Germany	25 January 1973	GG No 3898 dd 1973-05-25	28 February 1975
20	Ghana	2 November 2004	GG No 29856 dd 2007-05-18	23 April 2007
21	Greece	19 November 1998	GG No 24996 dd 2003-03-03	14 February 2003
22	Hungary	4 March 1994	GG No 17438 dd 1996-09-13	5 May 1996
23	India	4 December 1996	GG No 18545 dd 1997-12-12	28 November 1997
24	Indonesia	15 July 1997	GG No 19766 dd 1999-02-16	23 November 1998
25	Iran	3 November 1997	GG No 19637 dd 1998-12-22	23 November 1998
26	Ireland	7 October 1997	GG No 18552 dd 1997-12-15	5 December 1997
27	Israel	10 February 1978	GG No 6577 dd 1979-07-13	27 May 1980
28	Italy	16 November 1995	GG No 19823 dd 1999-03-08	2 March 1999
29	Japan	7 March 1997	GG No 18391 dd 1997-10-27	5 November 1997
30	Korea	7 July 1995	GG No 16918 dd 1996-01-26	7 January 1996
31	Kuwait	17 February 2004	GG No 29815 dd 2007-04-20	25 April 2006
32	Lesotho	24 October 1995	GG No 17948 dd 1997-04-22	9 January 1997

Number	Country	Date convention concluded	Government Gazette number and date published	Date of Entry Into Force
33	Luxembourg	23 November 1998	GG No 21852 dd 2000-12-06	8 September 2000
34	Malawi	3 May 1971	GG No 1479 dd 1971-08-13	2 September 1971
35	Malaysia	26 July 2005	GG No 29021 dd 2006-07-13	17 March 2006
36	Malta	16 May 1997	GG No 18461 dd 1997-11-21	12 November 1997
37	Mauritius	5 July 1996	GG No 18111 dd 1997-07-02	20 June 1997
38	Namibia	18 May 1998	GG No 19780 dd 1999-02-19	11 April 1999
39	Netherlands	15 March 1971	GG No 3153 dd 1971-06-18	20 January 1972
40	New Zealand	6 February 2002	GG No 26798 dd 2004-09-17	23 July 2004
41	Norway	12 February 1996	GG No 17504 dd 1996-10-15	12 September 1996
42	Oman	9 October 2002	GG No 25913 dd 2004-01-15	29 December 2003
43	Pakistan	26 January 1998	GG No 19849 dd 1999-03-17	9 March 1999
44	Poland	10 November 1993	GG No 17201 dd 1996-05-16	5 December 1995
45	Romania	12 November 1993	GG No 16680 dd 1995-09-27	21 October 1995
46	Russian Federation	27 November 1995	GG No 21395 dd 2000-07-20	26 June 2000
47	Seychelles	26 August 1998	GG No 25646 dd 2003-10-30	29 July 2002
48	Singapore	23 December 1996	GG No 18599 dd 1998-01-02	5 December 1997

Number	Country	Date convention concluded	Government Gazette number and date published	Date of Entry Into Force
49	Slovak Republic	28 May 1998	GG No 20409 dd 1999-08-25	30 June 1999
50	Spain	29 June 2006	GG No 30837 dd 2008-03-12	28 December 2007
51	Swaziland	23 January 2004	GG No 27637 dd 2005-06-01	08 February 2005
52	Sweden	24 May 1995	GG No 16890 dd 1995-12-27	25 December 1995
53	Switzerland	3 July 1967	GG No 2157 dd 1968-09-06	11 July 1968
54	Taiwan	14 February 1994	GG No 17408 dd 1996-09-03	12 September 1996
55	Tanzania	22 September 2005	GG No 30039 dd 2007-07-04	15 June 2007
56	Thailand	12 February 1996	GG No 17409 dd 1996-09-03	27 August 1996
57	Tunisia	2 February 1999	GG No 20728 dd 1999-12-15	10 December 1999
58	Turkey	3 March 2005	GG No 29464 dd 2006-12-11	6 December 2006
59	Uganda	27 May 1997	GG No 22313 dd 2001-05-24	9 April 2001
60	Ukraine	28 August 2003	GG No 27150 dd 2005-01-10	29 December 2004
61	United Kingdom	4 July 2002	GG No 24335 dd 2003-01-31	17 December 2002
62	United States of America (USA)	17 February 1997	GG No 18553 dd 1997-12-15	28 December 1997
63	Zambia	22 May 1956	See Proclamations No. 174 of 1956 and 60 of 1960	31 August 1956
64	Zimbabwe	10 June 1965	GG No 1234 dd 1965-09-24	3 September 1965

APPENDIX D

WITHHOLDING TAX ON SPORTSPERSONS – SECTIONS 47A – 47K

47A. Definitions. —

For purposes of this Part —

(a) "entertainer or sportsperson" includes any person who for reward —

(i) performs any activity as a theatre, motion picture, radio or television artiste or a musician;

(ii) takes part in any type of sport; or

(iii) takes part in any other activity which is usually regarded as of an entertainment character;

(b) "specified activity" means any personal activity exercised in the Republic or to be exercised by a person as an entertainer or sportsperson, whether alone or with any other person or persons.

[S. 47A inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

47B. Imposition of tax. —

(1) Subject to subsection (3), there must be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the tax on foreign entertainers and sportspersons, in respect of any amount received by or accrued to any person who is not a resident (in this Part referred to as the "taxpayer") in respect of any specified activity exercised or to be exercised by that person or any other person who is not a resident.

(2) The tax on foreign entertainers and sportspersons is a final tax and is levied at a rate of 15% on all amounts received by or accrued to a taxpayer as contemplated in subsection (1).

(3) Subsection (1) does not apply in respect of any person who is not a resident, if that person—

(a) is an employee of an employer who is a resident; and

(b) is physically present in the Republic for a period or periods exceeding 183 full days in aggregate during any 12 month period commencing or ending during the year of assessment in which the specified activity is exercised.

[S. 47B inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

47C. Liability for payment of tax. —

(1) A taxpayer must, within 30 days (or within such further period as the Commissioner may approve) after an amount contemplated in section 47B is received by or accrues to that taxpayer, pay to the Commissioner the amount of tax which is leviable in terms of this Part in respect of that amount.

(2) This section does not apply to any amounts received by or accrued to the taxpayer—

(a) from which the full amount of tax has been withheld by a resident in terms of section 47D; or

(b) in respect of which the tax has been recovered from a resident in his or her personal capacity in terms of section 47G (1).

[S. 47C inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

47D. Withholding of amounts of tax. —

(1) Any resident who is liable to pay to a taxpayer any amount contemplated in section 47B (1) must deduct or withhold from that payment the amount of tax for which the taxpayer is liable under that section in respect of that amount.

(2) A taxpayer from whom an amount has been deducted or withheld in terms of this section is deemed to have received the amount so deducted or withheld.

[S. 47D inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

47E. Payment of amounts of tax deducted or withheld. —

(1) A resident must pay any amount deducted or withheld in terms of section 47D to the Commissioner before the end of the month following the month during which that amount was so deducted or withheld.

(2) The payment contemplated in subsection (1) is a payment made on behalf of the taxpayer in respect of his or her liability under section 47B.

[S. 47E inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

47F. Submission of return. —

(1) A taxpayer must, together with the payment contemplated in section 47C (1), submit to the Commissioner a return in the manner and form and containing the information as may be prescribed by the Commissioner.

(2) A resident who pays to the Commissioner any amount in terms of section 47E, must together with that payment submit to the Commissioner a return in the manner and form and containing the information as may be prescribed by the Commissioner.

[S. 47F inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

47G. Personal liability of resident. —

(1) A resident who—

(a) fails to deduct or withhold an amount of tax in terms of section 47D from any payment made to a taxpayer; or

(b) deducts or withholds an amount of tax but fails to pay that amount over in terms of section 47E, is personally liable for payment of that amount of tax, which may be recovered from that resident in terms of this Act as if it is a tax due by that resident.

(2) Any amount recovered from a resident in terms of subsection (1) is an amount of tax which is paid on behalf of the relevant taxpayer in respect of his or her liability under section 47B.

(3) Subsection (1) (a) does not apply where the taxpayer has in terms of section 47C (1) paid to the Commissioner the amount of tax payable under this Part in respect of the payment from which the resident has so failed to deduct or withhold the tax.

[S. 47G inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

47H. Recovery of amounts paid to Commissioner. —

(1) A taxpayer on whose behalf an amount deducted or withheld has been paid to the Commissioner under this Part, is not entitled to recover from the resident the amount so deducted or withheld.

(2) A resident who, in terms of section 47G, has in his or her personal capacity paid any amount of tax for which a taxpayer is liable under this Part, may recover the amount of tax so paid from the taxpayer.

[S. 47H inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

47I. Application of certain provisions. —

The provisions contained in Chapter III of this Act apply mutatis mutandis in respect of any tax on foreign entertainers and sportspersons payable in terms of this Part.

[S. 47I inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

47J. Currency of payments made to Commissioner. —

If an amount deducted or withheld by a resident in terms of section 47D is denominated in any currency other than the currency of the Republic, the amount so deducted or withheld and paid to the Commissioner must be translated to the currency of the Republic at the spot rate on the date on which that amount was so deducted or withheld.

[S. 47J inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

47K. Notification of specified activity. —

Any resident who is primarily responsible for founding, organising, or facilitating a specified activity in the Republic and who will be rewarded directly or indirectly for that function of founding, organising or facilitating must, in the manner and form prescribed by the Commissioner—

(c) notify the Commissioner of that specified activity within 14 days after the agreement relating to that founding, organising or facilitating of that specified activity has been concluded; and

(d) provide to the Commissioner such other details relating thereto as may be required by the Commissioner.

[S. 47K inserted by s. 44 (1) of Act No. 31 of 2005 with effect from 1 August, 2006: Proclamation No. R.31 in Government Gazette 29072 of 28 July, 2006 and applicable in respect of any specified activity performed on or after that date.]

APPENDIX E

ANALYSIS TABLE OF THE SPORTSPERSON PARAGRAPH

Number	Country	Athlete; Sportsmen or Sportsperson	Sportsperson article / sportsperson paragraph	Override for Dependent Personal Service / Income from Employment in paragraph 1	Override for Business Profits - paragraph 1
1	Algeria	Sportspersons	Yes	Yes	Yes
2	Australia	Sportspersons	Yes	Yes	Yes
3	Austria	Sportsmen	Yes	Yes	Yes
4	Belarus	Sportspersons	Yes	Yes	Yes
5	Belgium	Sportsmen	Yes	Yes	Yes
6	Botswana	Sportspersons	Yes	Yes	Yes
7	Brazil	Sportspersons	Yes	Yes	Yes
8	Bulgaria	Sportspersons	Yes	Yes	Yes
9	Canada	Sportsmen	Yes	Yes	Yes
10	Croatia	Sportspersons	Yes	Yes	Yes
11	Cyprus	Sportspersons	Yes	Yes	Yes
12	Czech Republic	Sportsmen	Yes	Yes	Yes
13	Denmark	Sportsmen	Yes	Yes	Yes
14	Egypt	Sportsmen	Yes	Yes	Yes
15	Ethiopia	Sportspersons	Yes	Yes	Yes
16	Finland	Sportsmen	Yes	Yes	Yes
17	France	Athlete	Yes	Yes	No
18	Germany	Athlete	Yes	Yes	Yes
19	Ghana	Sportspersons	Yes	Yes	Yes
20	Greece	Sportspersons	Yes	Yes	Yes
21	Grenada	Athlete	No	N/A	N/A
22	Hungary	Athlete	Yes	Yes	No
23	India	Sportspersons	Yes	Yes	Yes
24	Indonesia	Sportspersons	Yes	Yes	Yes
25	Iran	Sportspersons	Yes	Yes	Yes
26	Ireland	Sportspersons	Yes	Yes	Yes

Number	Country	Override for Independent Personal Service - paragraph 1	De Minimus rule	Additional override - paragraph 1	Conclusion date
1	Algeria	Yes	No	No	28-Apr-98
2	Australia	Yes	No	No	01-Jul-99
3	Austria	Yes	No	No	04-Mar-96
4	Belarus	N/A	No	No	18-Sep-02
5	Belgium	Yes	No	No	01-Feb-95
6	Botswana	N/A	No	No	07-Aug-03
7	Brazil	Yes	No	No	08-Nov-03
8	Bulgaria	N/A	No	No	29-Apr-04
9	Canada	Yes	No	No	27-Nov-95
10	Croatia	Yes	No	No	18-Nov-96
11	Cyprus	Yes	No	No	26-Nov-97
12	Czech Republic	Yes	No	No	11-Nov-96
13	Denmark	Yes	No	No	21-Jun-95
14	Egypt	Yes	No	No	26-Aug-97
15	Ethiopia	N/A	No	No	17-Mar-04
16	Finland	Yes	No	No	26-May-95
17	France	Yes	No	No	08-Nov-93
18	Germany	Yes	No	Yes	25-Jan-73
19	Ghana	Yes	No	No	02-Nov-04
20	Greece	Yes	No	No	19-Nov-98
21	Grenada	N/A	No	Non application of short stay to athletes	06-Aug-60
22	Hungary	Yes	No	No	04-Mar-94
23	India	Yes	No	No	04-Dec-96
24	Indonesia	Yes	No	No	15-Jul-97
25	Iran	Yes	No	No	03-Nov-97
26	Ireland	Yes	No	No	07-Oct-97

Number	Country	Athlete; Sportsmen or Sportsperson	Sportsperson article / sportsperson paragraph	Override for Dependent Personal Service / Income from Employment in paragraph 1	Override for Business Profits - paragraph 1
27	Israel	Athlete	Yes	Yes	No
28	Italy	Sportsmen	Yes	Yes	Yes
29	Japan	Sportsmen	Yes	Yes	Yes
30	Korea	Sportsmen	Yes	Yes	Yes
31	Kuwait	Sportspersons	Yes	Yes	Yes
32	Lesotho	Sportsmen	Yes	Yes	No
33	Luxembourg	Sportsmen	Yes	Yes	Yes
34	Malawi	Athlete	Yes	Yes	Yes
35	Malaysia	Sportspersons	Yes	Yes	Yes
36	Malta	Sportsmen	Yes	Yes	Yes
37	Mauritius	Sportsmen	Yes	Yes	No
38	Mozambique	Sportspersons	Yes	Yes	Yes
39	Namibia	Sportspersons	Yes	Yes	Yes
40	Netherlands	Athlete	Yes	Yes	No
41	Netherlands (Renegotiated)	Sportspersons	Yes	Yes	Yes
42	New Zealand	Sportspersons	Yes	Yes	Yes
43	Norway	Sportsmen	Yes	Yes	Yes
44	Oman	Sportspersons	Yes	Yes	Yes
45	Pakistan	Sportspersons	Yes	Yes	Yes
46	Peoples' Republic of China	Sportspersons	Yes	Yes	No
47	Poland	Athlete	Yes	Yes	No
48	Republic of Taiwan	Athlete	Yes	Yes	No
49	Romania	Athlete	Yes	Yes	No
50	Russian Federation	Athlete	Yes	Yes	No
51	Rwanda	Sportspersons	Yes	Yes	Yes

Number	Country	Override for Independent Personal Service - paragraph 1	De Minimus rule	Additional override - paragraph 1	Conclusion date
27	Israel	Yes	No	Yes - reference to PE	10-Feb-78
28	Italy	Yes	No	No	16-Nov-95
29	Japan	Yes	No	No	07-Mar-97
30	Korea	Yes	No	No	07-Jul-95
31	Kuwait	Yes	No	No	17-Feb-04
32	Lesotho	Yes	No	No	24-Oct-95
33	Luxembourg	Yes	No	No	23-Nov-98
34	Malawi	Yes	No	Yes	03-May-71
35	Malaysia	Yes	No	No	26-Jul-05
36	Malta	Yes	No	No	16-May-97
37	Mauritius	Yes	No	No	05-Jul-96
38	Mozambique	N/A	No	No	18-Sep-07
39	Namibia	Yes	No	No	18-May-98
40	Netherlands	Yes	No	No	15-Mar-71
41	Netherlands (Renegotiated)	N/A	No	No	10-Oct-05
42	New Zealand	N/A	No	No	06-Feb-02
43	Norway	Yes	No	No	12-Feb-96
44	Oman	N/A	No	No	09-Oct-02
45	Pakistan	Yes	No	No	26-Jan-98
46	Peoples' Republic of China	Yes	No	No	25-Apr-00
47	Poland	Yes	No	No	10-Nov-93
48	Republic of Taiwan	Yes	No	No	14-Feb-94
49	Romania	Yes	No	No	12-Nov-93
50	Russian Federation	Yes	No	No	27-Nov-95
51	Rwanda	N/A	No	No	05-Dec-02

Number	Country	Athlete; Sportsmen or Sportsperson	Sportsperson article / sportsperson paragraph	Override for Dependent Personal Service / Income from Employment in paragraph 1	Override for Business Profits - paragraph 1
52	Seychelles	Sportspersons	Yes	Yes	Yes
53	Sierra Leone	Athlete	No	N/A	N/A
54	Singapore	Sportsmen	Yes	Yes	Yes
55	Slovak Republic	Sportspersons	Yes	Yes	Yes
56	Spain	Sportspersons	Yes	Yes	Yes
57	Swaziland	Sportspersons	Yes	Yes	Yes
58	Sweden	Sportsmen	Yes	Yes	Yes
59	Switzerland	Athlete	Yes	Yes	No
60	Tanzania	Sportspersons	Yes	Yes	Yes
61	Thailand	Sportsmen	Yes	Yes	Yes
62	Tunisia	Sportspersons	Yes	Yes	Yes
63	Turkey	Sportspersons	Yes	Yes	Yes
64	Uganda	Sportspersons	Yes	Yes	Yes
65	Ukraine	Sportspersons	Yes	Yes	Yes
66	United Kingdom	Sportspersons	Yes	Yes	Yes
67	United States of America	Sportsmen	Yes	Yes	Yes
68	Zambia	Athlete	No	N/A	N/A
69	Zimbabwe	Athlete	Yes	Yes	Yes

Number	Country	Override for Independent Personal Service - paragraph 1	De Minimus rule	Additional override - paragraph 1	Conclusion date
52	Seychelles	Yes	No	No	26-Aug-98
53	Sierra Leone	N/A	No	Non application of short stay to athletes	06-Aug-60
54	Singapore	Yes	No	No	23-Dec-96
55	Slovak Republic	Yes	No	No	28-May-98
56	Spain	N/A	No	No	29-Jun-06
57	Swaziland	N/A	No	No	23-Jan-04
58	Sweden	Yes	No	No	24-May-95
59	Switzerland	Yes	No	Yes	03-Jul-67
60	Tanzania	N/A	No	No	22-Sep-05
61	Thailand	Yes	No	No	12-Feb-96
62	Tunisia	Yes	No	No	02-Feb-99
63	Turkey	Yes	No	No	03-Mar-05
64	Uganda	Yes	No	No	27-May-97
65	Ukraine	N/A	No	No	28-Aug-03
66	United Kingdom	N/A	No	No	04-Jul-02
67	United States of America	Yes	Yes	No	17-Feb-97
68	Zambia	N/A	No	Non application of short stay to athletes	22-May-56
69	Zimbabwe	Yes	No	Yes	10-Jun-65

APPENDIX F

ANALYSIS TABLE OF THE ENTITY PARAGRAPH

Number	Country	Entity paragraph	Override for Dependent Personal Service / Income from Employment - entity paragraph	Override for Business Profits - entity paragraph	Override for Independent Personal Service - entity paragraph
1	Algeria	Yes	Yes	Yes	Yes
2	Australia	Yes	Yes	Yes	Yes
3	Austria	Yes	Yes	Yes	Yes
4	Belarus	Yes	Yes	Yes	N/A
5	Belgium	Yes	Yes	Yes	Yes
6	Botswana	Yes	Yes	Yes	N/A
7	Brazil	Yes	Yes	Yes	Yes
8	Bulgaria	Yes	Yes	Yes	N/A
9	Canada	Yes	Yes	Yes	Yes
10	Croatia	Yes	Yes	Yes	Yes
11	Cyprus	Yes	Yes	Yes	Yes
12	Czech Republic	Yes	Yes	Yes	Yes
13	Denmark	Yes	Yes	Yes	Yes
14	Egypt	Yes	Yes	Yes	Yes
15	Ethiopia	Yes	Yes	Yes	N/A
16	Finland	Yes	Yes	Yes	Yes
17	France	Yes	Yes	Yes	Yes
18	Germany	No	N/A	N/A	N/A
19	Ghana	Yes	Yes	Yes	Yes
20	Greece	Yes	Yes	Yes	Yes
21	Grenada	N/A	N/A	N/A	N/A
22	Hungary	Yes	Yes	Yes	Yes
23	India	Yes	Yes	Yes	Yes
24	Indonesia	Yes	Yes	Yes	Yes
25	Iran	Yes	Yes	Yes	Yes
26	Ireland	Yes	Yes	Yes	Yes

Number	Country	Additional override - entity paragraph	Entity limitation to anti-avoidance purpose	Public funds and/or cultural exchange exclusion	Conclusion date
1	Algeria	No	No	Yes	28-Apr-98
2	Australia	No	No	No	01-Jul-99
3	Austria	No	No	No	04-Mar-96
4	Belarus	No	No	No	18-Sep-02
5	Belgium	No	No	No	01-Feb-95
6	Botswana	No	No	Yes	07-Aug-03
7	Brazil	No	No	Yes	08-Nov-03
8	Bulgaria	No	No	No	29-Apr-04
9	Canada	No	Yes	Yes	27-Nov-95
10	Croatia	No	No	No	18-Nov-96
11	Cyprus	No	No	Yes	26-Nov-97
12	Czech Republic	No	No	No	11-Nov-96
13	Denmark	No	No	Yes	21-Jun-95
14	Egypt	No	No	No	26-Aug-97
15	Ethiopia	No	No	Yes	17-Mar-04
16	Finland	No	No	No	26-May-95
17	France	No	No	Yes	08-Nov-93
18	Germany	N/A	N/A	No	25-Jan-73
19	Ghana	No	No	Yes	02-Nov-04
20	Greece	No	No	No	19-Nov-98
21	Grenada	N/A	N/A	No	06-Aug-60
22	Hungary	No	No	Yes	04-Mar-94
23	India	No	No	Yes	04-Dec-96
24	Indonesia	No	No	Yes	15-Jul-97
25	Iran	No	No	Yes	03-Nov-97
26	Ireland	No	No	No	07-Oct-97

Number	Country	Entity paragraph	Override for Dependent Personal Service / Income from Employment - entity paragraph	Override for Business Profits - entity paragraph	Override for Independent Personal Service - entity paragraph
27	Israel	No	N/A	N/A	N/A
28	Italy	Yes	Yes	Yes	Yes
29	Japan	Yes	Yes	Yes	Yes
30	Korea	Yes	Yes	Yes	Yes
31	Kuwait	Yes	Yes	Yes	Yes
32	Lesotho	Yes	Yes	Yes	Yes
33	Luxembourg	Yes	Yes	Yes	Yes
34	Malawi	No	N/A	N/A	N/A
35	Malaysia	Yes	Yes	Yes	Yes
36	Malta	Yes	Yes	Yes	Yes
37	Mauritius	Yes	Yes	Yes	Yes
38	Mozambique	Yes	Yes	Yes	N/A
39	Namibia	Yes	Yes	Yes	Yes
40	Netherlands	No	N/A	N/A	N/A
41	Netherlands (Renegotiated)	Yes	Yes	Yes	N/A
42	New Zealand	Yes	Yes	Yes	N/A
43	Norway	Yes	Yes	Yes	Yes
44	Oman	Yes	Yes	Yes	N/A
45	Pakistan	Yes	Yes	Yes	Yes
46	Peoples' Republic of China	Yes	Yes	Yes	Yes
47	Poland	Yes	Yes	Yes	Yes
48	Republic of Taiwan	Yes	Yes	Yes	Yes
49	Romania	Yes	Yes	Yes	Yes
50	Russian Federation	Yes	Yes	Yes	Yes
51	Rwanda	Yes	Yes	Yes	N/A
52	Seychelles	Yes	Yes	Yes	Yes

Number	Country	Additional override - entity paragraph	Entity limitation to anti-avoidance purpose	Public funds and/or cultural exchange exclusion	Conclusion date
27	Israel	N/A	N/A	No	10-Feb-78
28	Italy	No	No	No	16-Nov-95
29	Japan	No	No	Yes	07-Mar-97
30	Korea	No	No	Yes	07-Jul-95
31	Kuwait	No	No	Yes	17-Feb-04
32	Lesotho	No	No	No	24-Oct-95
33	Luxembourg	No	No	No	23-Nov-98
34	Malawi	N/A	N/A	No	03-May-71
35	Malaysia	No	No	Yes	26-Jul-05
36	Malta	No	No	No	16-May-97
37	Mauritius	No	No	Yes	05-Jul-96
38	Mozambique	No	No	Yes	18-Sep-07
39	Namibia	No	No	No	18-May-98
40	Netherlands	N/A	N/A	No	15-Mar-71
41	Netherlands (Renegotiated)	No	No	Yes	10-Oct-05
42	New Zealand	No	No	No	06-Feb-02
43	Norway	No	No	Yes	12-Feb-96
44	Oman	No	No	Yes	09-Oct-02
45	Pakistan	No	No	Yes	26-Jan-98
46	Peoples' Republic of China	No	No	Yes	25-Apr-00
47	Poland	No	No	Yes	10-Nov-93
48	Republic of Taiwan	No	No	No	14-Feb-94
49	Romania	No	No	Yes	12-Nov-93
50	Russian Federation	No	No	No	27-Nov-95
51	Rwanda	No	No	No	05-Dec-02
52	Seychelles	No	No	Yes	26-Aug-98

Number	Country	Entity paragraph	Override for Dependent Personal Service / Income from Employment - entity paragraph	Override for Business Profits - entity paragraph	Override for Independent Personal Service - entity paragraph
53	Sierra Leone	N/A	N/A	N/A	N/A
54	Singapore	Yes	Yes	Yes	Yes
55	Slovak Republic	Yes	Yes	Yes	Yes
56	Spain	Yes	Yes	Yes	N/A
57	Swaziland	Yes	Yes	Yes	N/A
58	Sweden	Yes	Yes	Yes	Yes
59	Switzerland	No	N/A	N/A	N/A
60	Tanzania	Yes	Yes	Yes	N/A
61	Thailand	Yes	Yes	Yes	Yes
62	Tunisia	Yes	Yes	Yes	Yes
63	Turkey	Yes	Yes	Yes	Yes
64	Uganda	Yes	Yes	Yes	Yes
65	Ukraine	Yes	Yes	Yes	N/A
66	United Kingdom	Yes	Yes	Yes	N/A
67	United States of America	Yes	Yes	Yes	Yes
68	Zambia	N/A	N/A	N/A	N/A
69	Zimbabwe	No	N/A	N/A	N/A

Number	Country	Additional override - entity paragraph	Entity limitation to anti-avoidance purpose	Public funds and/or cultural exchange exclusion	Conclusion date
53	Sierra Leone	N/A	N/A	No	06-Aug-60
54	Singapore	No	No	Yes	23-Dec-96
55	Slovak Republic	No	No	Yes	28-May-98
56	Spain	No	No	No	29-Jun-06
57	Swaziland	No	No	No	23-Jan-04
58	Sweden	No	No	No	24-May-95
59	Switzerland	N/A	N/A	No	03-Jul-67
60	Tanzania	No	No	Yes	22-Sep-05
61	Thailand	No	No	Yes	12-Feb-96
62	Tunisia	No	No	No	02-Feb-99
63	Turkey	No	No	Yes	03-Mar-05
64	Uganda	No	No	No	27-May-97
65	Ukraine	No	No	Yes	28-Aug-03
66	United Kingdom	No	No	Yes	04-Jul-02
67	United States of America	No	Yes	Yes	17-Feb-97
68	Zambia	N/A	N/A	No	22-May-56
69	Zimbabwe	N/A	N/A	No	10-Jun-65

APPENDIX G

POTENTIAL PARTICIPATING COUNTRIES FOR THE 2010 FIFA WORLD CUP AND DTA STATUS WITH SOUTH AFRICA

Africa	DTA Y/N	Asia	DTA Y/N	Europe	DTA Y/N
Algeria	**Yes**	Afghanistan	No	Albania	No
Angola	No	Australia	**Yes**	Andorra	No
Benin	No	Bahrain	No	Armenia	No
Botswana	**Yes**	Bangladesh	No	Austria	**Yes**
Burkina Faso	No	Cambodia	No	Azerbaijan	No
Burundi	No	China PR	**Yes**	Belarus	**Yes**
Cameroon	No	Chinese Taipei	No	Belgium	**Yes**
Cape Verde Islands	No	Hong Kong	No	Bosnia-Herzegovina	No
Chad	No	India	**Yes**	Bulgaria	**Yes**
Comoros	No	Indonesia	**Yes**	Croatia	**Yes**
Congo	No	Iran	**Yes**	Cyprus	**Yes**
Congo DR	No	Iraq	No	Czech Republic	**Yes**
Côte d'Ivoire	No	Japan	**Yes**	Denmark	**Yes**
Djibouti	No	Jordan	No	England	**Yes***
Egypt	**Yes**	Korea DPR	No	Estonia	No
Equatorial Guinea	No	Korea Republic	**Yes**	Faroe Islands	No
Ethiopia	**Yes**	Kuwait	**Yes**	Finland	**Yes**
Gabon	No	Kyrgyzstan	No	France	**Yes**
Gambia	No	Lebanon	No	FYR Macedonia	No
Ghana	**Yes**	Macau	No	Georgia	No
Guinea	No	Malaysia	**Yes**	Germany	**Yes**
Guinea-Bissau	No	Maldives	No	Greece	**Yes**
Kenya	No	Mongolia	No	Hungary	**Yes**
Lesotho	**Yes**	Myanmar	No	Iceland	No
Liberia	No	Nepal	No	Israel	**Yes**
Libya	No	Oman	**Yes**	Italy	**Yes**
Madagascar	No	Pakistan	**Yes**	Kazakhstan	No
Malawi	**Yes**	Palestine	No	Latvia	No
Mali	No	Qatar	No	Liechtenstein	No
Mauritania	No	Saudi Arabia	**Yes**	Lithuania	No
Mauritius	**Yes**	Singapore	**Yes**	Luxembourg	**Yes**
Morocco	No	Sri Lanka	No	Malta	**Yes**
Mozambique	**Yes#**	Syria	No	Moldova	No
Namibia	**Yes**	Tajikistan	No	Montenegro	No
Niger	No	Thailand	**Yes**	Netherlands	**Yes**
Nigeria	**Yes#**	Timor-Leste	No	Northern Ireland	**Yes***
Rwanda	No	Turkmenistan	No	Norway	**Yes**
Senegal	No	United Arab Emirates	No	Poland	**Yes**
Seychelles	**Yes**	Uzbekistan	No	Portugal	**Yes#**
Sierra Leone	**Yes**	Vietnam	No	Republic of Ireland	**Yes**
Somalia	No	Yemen	No	Romania	**Yes**
South Africa	**N/A**			Russia	**Yes**
Sudan	No			San Marino	No
Swaziland	**Yes**			Scotland	**Yes***
Tanzania	**Yes**			Serbia	No
Togo	No			Slovakia	**Yes**
Tunisia	**Yes**			Slovenia	No
Uganda	**Yes**			Spain	**Yes**

Africa	DTA Y/N	Asia	DTA Y/N	Europe	DTA Y/N
Zambia	**Yes**			Sweden	**Yes**
Zimbabwe	**Yes**			Switzerland	**Yes**
				Turkey	**Yes**
				Ukraine	**Yes**
				Wales	**Yes***

N&C America + Caribbean	DTA Y/N	Oceania	DTA Y/N	South America	DTA Y/N
Anguilla	No	American Samoa	No	Argentina	No
Antigua and Barbuda	No	Cook Islands	No	Bolivia	No
Aruba	No	Fiji	No	Brazil	**Yes**
Bahamas	No	New Caledonia	No	Chile	No
Barbados	No	New Zealand	**Yes**	Colombia	No
Belize	No	Samoa	No	Ecuador	No
Bermuda	No	Solomon Islands	No	Paraguay	No
British Virgin Islands	No	Tahiti	No	Peru	No
Canada	**Yes**	Tonga	No	Uruguay	No
Cayman Islands	No	Tuvalu	No	Venezuela	No
Costa Rica	No	Vanuatu	No		
Cuba	No				
Dominica	No				
Dominican Republic	No				
El Salvador	No				
Grenada	**Yes**				
Guatemala	No				
Guyana	No				
Haiti	No				
Honduras	No				
Jamaica	No				
Mexico	No				
Montserrat	No				
Netherlands Antilles	No				
Nicaragua	No				
Panama	No				
Puerto Rico	No				
St. Kitts and Nevis	No				
St. Lucia	No				
St. Vincent / Grenadines	No				
Suriname	No				
Trinidad and Tobago	No				
Turks and Caicos Islands	No				
US Virgin Islands	No				
USA	**Yes**				

No means no DTA with South Africa

Yes means State has a DTA with South Africa in force at 1 June 2008

Yes* refers to the DTA with the United Kingdom in force at 1 June 2008

Yes# DTA in force after 1 June 2008

African countries detail sourced at http://www.fifa.com/worldcup/preliminaries/africa/teams/index.html

Asian countries detail sourced at http://www.fifa.com/worldcup/preliminaries/asia/teams/index.html

European countries detail sourced at http://www.fifa.com/worldcup/preliminaries/europe/teams/index.html

North and Central America and the Caribbean countries detail sourced at http://www.fifa.com/worldcup/preliminaries/nccamerica/teams/index.html

Oceania countries detail sourced at http://www.fifa.com/worldcup/preliminaries/oceania/teams/index.html

South American countries detail sourced at http://www.fifa.com/worldcup/preliminaries/southamerica/teams/index.html

APPENDIX H

ADMINISTRATIVE ARTICLES INCLUDED IN THE SOUTH AFRICAN DTA NETWORK

Number	Country	Conclusion date	Non-Discrimination Article	Mutual Agreement	Exchange of Information	Assistance in the Collection of Taxes Article
1	Algeria	28-Apr-98	Yes	Yes	Yes	Yes
2	Australia	01-Jul-99	Yes#	No	Yes#	Yes#
3	Austria	04-Mar-96	Yes	Yes	Yes	No
4	Belarus	18-Sep-02	Yes	Yes	Yes	No
5	Belgium	01-Feb-95	Yes	Yes	Yes	Yes
6	Botswana	07-Aug-03	Yes	Yes	Yes	Yes
7	Brazil	08-Nov-03	Yes	Yes	Yes	No
8	Bulgaria	29-Apr-04	Yes	Yes	Yes	No
9	Canada	27-Nov-95	Yes	Yes	Yes	No
10	Croatia	18-Nov-96	Yes	Yes	Yes	No
11	Cyprus	26-Nov-97	Yes	Yes	Yes	No
12	Czech Republic	11-Nov-96	Yes	Yes	Yes	No
13	Denmark	21-Jun-95	Yes	Yes	Yes	Yes
14	Egypt	26-Aug-97	Yes	Yes	Yes	No
15	Ethiopia	17-Mar-04	Yes	Yes	Yes	No
16	Finland	26-May-95	Yes	Yes	Yes	No
17	France	08-Nov-93	Yes	Yes	Yes	No
18	Germany	25-Jan-73	Yes	Yes	Yes	No
19	Ghana	02-Nov-04	Yes	Yes	Yes	Yes
20	Greece	19-Nov-98	Yes	Yes	Yes	No
21	Grenada	06-Aug-60	No	No	Yes	No
22	Hungary	04-Mar-94	Yes	Yes	Yes	No
23	India	04-Dec-96	Yes	Yes	Yes	Yes
24	Indonesia	15-Jul-97	Yes	Yes	Yes	No
25	Iran	03-Nov-97	Yes	Yes	Yes	No
26	Ireland	07-Oct-97	Yes	Yes	Yes	No
27	Israel	10-Feb-78	Yes	Yes	Yes	No
28	Italy	16-Nov-95	Yes	Yes	Yes	No
29	Japan	07-Mar-97	Yes	Yes	Yes	No
30	Korea	07-Jul-95	Yes	Yes	Yes	No
31	Kuwait	17-Feb-04	Yes	Yes	Yes	No
32	Lesotho	24-Oct-95	Yes	Yes	Yes	Yes
33	Luxembourg	23-Nov-98	Yes	Yes	Yes	No
34	Malawi	03-May-71	No	No	Yes	No
35	Malaysia	26-Jul-05	Yes	Yes	Yes	No
36	Malta	16-May-97	Yes	Yes	Yes	No
37	Mauritius	05-Jul-96	Yes	Yes	Yes	No
38	Mozambique	18-Sep-07	Yes	Yes	Yes	Yes
39	Namibia	18-May-98	Yes	Yes	Yes	Yes
40	Netherlands	15-Mar-71	Yes	Yes	Yes	No

Number	Country	Conclusion date	Non-Discrimination Article	Mutual Agreement	Exchange of Information	Assistance in the Collection of Taxes Article
41	Netherlands (Renegotiated)	10-Oct-05	Yes	Yes	Yes	Yes
42	New Zealand	06-Feb-02	Yes	Yes	Yes	No
43	Norway	12-Feb-96	Yes	Yes	Yes	Yes
44	Oman	09-Oct-02	Yes	Yes	Yes	No
45	Pakistan	26-Jan-98	Yes	Yes	Yes	No
46	Peoples' Republic of China	25-Apr-00	Yes	Yes	Yes	No
47	Poland	10-Nov-93	Yes	Yes	Yes	No
48	Republic of Taiwan	14-Feb-94	Yes	Yes	Yes	No
49	Romania	12-Nov-93	Yes	Yes	Yes	No
50	Russian Federation	27-Nov-95	Yes	Yes	Yes	No
51	Rwanda	05-Dec-02	Yes	Yes	Yes	No
52	Seychelles	26-Aug-98	Yes	Yes	Yes	No
53	Sierra Leone	06-Aug-60	No	No	Yes	No
54	Singapore	23-Dec-96	Yes	Yes	Yes	No
55	Slovak Republic	28-May-98	Yes	Yes	Yes	No
56	Spain	29-Jun-06	Yes	Yes	Yes	No
57	Swaziland	23-Jan-04	Yes	Yes	Yes	Yes
58	Sweden	24-May-95	Yes	Yes	Yes	No
59	Switzerland	03-Jul-67	Yes	Yes	No	No
60	Tanzania	22-Sep-05	Yes	Yes	Yes	Yes
61	Thailand	12-Feb-96	Yes	Yes	Yes	No
62	Tunisia	02-Feb-99	Yes	Yes	Yes	No
63	Turkey	03-Mar-05	Yes	Yes	Yes	No
64	Uganda	27-May-97	Yes	Yes	Yes	Yes
65	Ukraine	28-Aug-03	Yes	Yes	Yes	Yes
66	United Kingdom	04-Jul-02	Yes	Yes	Yes	No
67	United States of America	17-Feb-97	Yes	Yes	Yes*	Yes*
68	Zambia	22-May-56	No	No	Yes	No
69	Zimbabwe	10-Jun-65	No	No	Yes	No

Key:

Yes Article included in DTA
No No such Article
Yes# Included by Protocol
Yes* Combined in one Article

APPENDIX I

SOUTH AFRICAN DTAS – EXCHANGE OF INFORMATION ARTICLE ANALYSIS – PART 1

Country	Conclusion date	Exchange of Information	OECD / UN / USA basis	UN Model
				Prevent fraud or evasion
Algeria	28-Apr-98	Yes	1977 OECD	No
Australia	01-Jul-99	Yes#	2005 / 2008 OECD Model	No
Austria	04-Mar-96	Yes	1977 OECD	No
Belarus	18-Sep-02	Yes	2000 OECD	No
Belgium	01-Feb-95	Yes	1977 OECD	No
Botswana	07-Aug-03	Yes	2001 UN & 2003 OECD	Yes
Brazil	08-Nov-03	Yes	2003 OECD	No
Bulgaria	29-Apr-04	Yes	2001 UN & 2003 OECD	Yes
Canada	27-Nov-95	Yes	1977 OECD and 1981 USA	No
Croatia	18-Nov-96	Yes	1977 OECD	No
Cyprus	26-Nov-97	Yes	1977 OECD	No
Czech Republic	11-Nov-96	Yes	1977 OECD and 1980 UN	No
Denmark	21-Jun-95	Yes	1977 OECD	No
Egypt	26-Aug-97	Yes	1977 OECD	No
Ethiopia	17-Mar-04	Yes	2003 OECD	No
Finland	26-May-95	Yes	1977 OECD	No
France	08-Nov-93	Yes	1977 OECD	No
Germany	25-Jan-73	Yes	1963 OECD	No
Ghana	02-Nov-04	Yes	2003 OECD	No
Greece	19-Nov-98	Yes	1977 OECD	No
Grenada	06-Aug-60	Yes	N/A	Yes

2008 OECD Model - Paragraph 1				
Exchange of information concerning:		*Imposed by:*	*Scope:*	
DTA purposes	**Administration and enforcement of domestic taxes of every kind and description**	**Contracting State, political sub-division or local authority**	**Not restricted by Article 1 (Persons Covered)**	**Not restricted by Article 2 (Taxes Covered) - see also USA Model**
Yes	No	Yes[1]	Yes	No
Yes	Yes	Yes[1]	Yes	No (see comment – part 4)
Yes	No	Yes[1]	Yes	No
Yes	Yes	Yes[2]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes	Yes[2]	Yes	Yes
Yes	Yes	Yes[1]	Yes	Yes
Yes	Yes	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes	Yes[2]	Yes	Yes
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	No	Yes[1]	No	No
Yes	Yes	Yes[2]	Yes	Yes
Yes	Yes[a]	Yes[1]	Yes	No
Yes	No	Yes[1]	No	No

Country	Conclusion date	Exchange of Information	OECD / UN / USA basis	UN Model
				Prevent fraud or evasion
Hungary	04-Mar-94	Yes	1977 OECD	No
India	04-Dec-96	Yes	1977 OECD	No
Indonesia	15-Jul-97	Yes	1977 OECD and 1980 UN	Yes
Iran	03-Nov-97	Yes	1977 OECD	No
Ireland	07-Oct-97	Yes	1977 OECD	No
Israel	10-Feb-78	Yes	1977 OECD and 1980 UN	Yes
Italy	16-Nov-95	Yes	1977 OECD and 1980 UN	Yes
Japan	07-Mar-97	Yes	1977 OECD and 1980 UN	Yes
Korea	07-Jul-95	Yes	1977 OECD	No
Kuwait	17-Feb-04	Yes	2003 OECD	No
Lesotho	24-Oct-95	Yes	1977 OECD and 1980 UN	No
Luxembourg	23-Nov-98	Yes	1977 OECD	No
Malawi	03-May-71	Yes	1963 OECD	Yes
Malaysia	26-Jul-05	Yes	2003 OECD	Yes
Malta	16-May-97	Yes	1977 OECD	No
Mauritius	05-Jul-96	Yes	1977 OECD and 1980 UN	Yes
Mozambique	18-Sep-07	Yes	2003 OECD	No
Namibia	18-May-98	Yes	1977 OECD	No
Netherlands	15-Mar-71	Yes	1963 OECD	Yes
Netherlands (Renegotiated)	10-Oct-05	Yes#	2005 / 2008 OECD Model	No
New Zealand	06-Feb-02	Yes	2000 OECD	No
Norway	12-Feb-96	Yes	1977 OECD	No

2008 OECD Model - Paragraph 1				
Exchange of information concerning:		*Imposed by:*	*Scope:*	
DTA purposes	**Administration and enforcement of domestic taxes of every kind and description**	**Contracting State, political sub-division or local authority**	**Not restricted by Article 1 (Persons Covered)**	**Not restricted by Article 2 (Taxes Covered) - see also USA Model**
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	No	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes	Yes[2]	Yes	Yes
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	No	Yes1	No	No
Yes	No	Yes[1]	No	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes	Yes[2]	Yes	Yes
Yes	Yes[a]	Yes[1]	Yes	No
Yes	No	Yes[1]	No	No
Yes	Yes	Yes	Yes	Yes
Yes	Yes	Yes[1]	Yes	Yes
Yes	Yes[a]	Yes[1]	Yes	No

Country	Conclusion date	Exchange of Information	OECD / UN / USA basis	UN Model
				Prevent fraud or evasion
Oman	09-Oct-02	Yes	1977 OECD and 1980 UN	Yes
Pakistan	26-Jan-98	Yes	1977 OECD	No
Peoples' Republic of China	25-Apr-00	Yes	1977 OECD	No
Poland	10-Nov-93	Yes	1977 OECD	No
Republic of Taiwan	14-Feb-94	Yes	1977 OECD	No
Romania	12-Nov-93	Yes	1977 OECD	No
Russian Federation	27-Nov-95	Yes	1977 OECD	No
Rwanda	05-Dec-02	Yes	2003 OECD	No
Seychelles	26-Aug-98	Yes	1977 OECD and 1980 UN	Yes
Sierra Leone	06-Aug-60	Yes	N/A	Yes
Singapore	23-Dec-96	Yes	1977 OECD	No
Slovak Republic	28-May-98	Yes	1977 OECD and 1980 UN	No
Spain	29-Jun-06	Yes	2003 OECD	No
Swaziland	23-Jan-04	Yes	2003 OECD	No
Sweden	24-May-95	Yes	1977 OECD and 1980 UN	No
Switzerland	03-Jul-67	**No**	N/A	N/A
Tanzania	22-Sep-05	Yes	2003 OECD and 2001 UN	No
Thailand	12-Feb-96	Yes	1977 OECD and 1980 UN	No
Tunisia	02-Feb-99	Yes	1977 OECD	No
Turkey	03-Mar-05	Yes	2003 OECD	No

2008 OECD Model - Paragraph 1				
Exchange of information concerning:		*Imposed by:*	*Scope:*	
DTA purposes	**Administration and enforcement of domestic taxes of every kind and description**	**Contracting State, political sub-division or local authority**	**Not restricted by Article 1 (Persons Covered)**	**Not restricted by Article 2 (Taxes Covered) - see also USA Model**
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes[a]	Yes[1]	No	No
Yes	Yes[a]	Yes[1]	No	No
Yes	Yes[a]	Yes[1]	No	No
Yes	Yes	Yes[2]	Yes	Yes
Yes	Yes[a]	Yes[1]	Yes	No
Yes	No	Yes[1]	No	No
Yes	Yes[a]	Yes[1]	No	No
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes	Yes	Yes	Yes
Yes	Yes	Yes[2]	Yes	Yes
Yes	Yes[a]	Yes[1]	Yes	No
N/A	N/A	N/A	N/A	N/A
Yes	Yes	Yes[2]	Yes	Yes
Yes	Yes[a]	Yes[1]	No	No
Yes	Yes[a]	Yes[1]	No	No
Yes	Yes	Yes	Yes	Yes

Country	Conclusion date	Exchange of Information	OECD / UN / USA basis	UN Model
				Prevent fraud or evasion
Uganda	27-May-97	Yes	1977 OECD and 1980 UN	Yes
Ukraine	28-Aug-03	Yes	2003 OECD and 2001 UN	Yes
United Kingdom	04-Jul-02	Yes	1977 OECD	No
United States of America	17-Feb-97	Yes	1996 USA Model	No
Zambia	22-May-56	Yes	No model	Yes
Zimbabwe	10-Jun-65	Yes	No model	Yes

Article included in DTA	Yes
No such Article	No
Included by Protocol	Yes#

2008 OECD Model - Paragraph 1				
Exchange of information concerning:		*Imposed by:*	*Scope:*	
DTA purposes	**Administration and enforcement of domestic taxes of every kind and description**	**Contracting State, political sub-division or local authority**	**Not restricted by Article 1 (Persons Covered)**	**Not restricted by Article 2 (Taxes Covered) - see also USA Model**
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes	Yes[2]	Yes	Yes
Yes	Yes[a]	Yes[1]	Yes	No
Yes	Yes	Yes[1]	Yes	Yes
Yes	No	Yes[1]	No	No
Yes	No	Yes[1]	No	No

Yes[a] - but not of every kind and description

Yes[1] - Contracting State only

Yes[2] - Contracting State plus political sub-division

APPENDIX J

SOUTH AFRICAN DTAS – EXCHANGE OF INFORMATION ARTICLE ANALYSIS – PART 2

Country	Conclusion date	2008 OECD Model - Paragraph 2			
		Secrecy:		*Disclosure permitted to persons concerned with:*	
		Information treated as secret	**In accordance with domestic laws of requested State**	**Assessment and Collection**	**Enforcement, prosecution and determination of appeals or oversight**
Algeria	28-Apr-98	Yes	Yes	Yes	Yes
Australia	01-Jul-99	Yes	Yes	Yes	Yes
Austria	04-Mar-96	Yes	Yes	Yes	Yes
Belarus	18-Sep-02	Yes	Yes	Yes	Yes
Belgium	01-Feb-95	Yes	Yes	Yes	Yes
Botswana	07-Aug-03	Yes	Yes	Yes	Yes
Brazil	08-Nov-03	Yes	Yes	Yes	Yes
Bulgaria	29-Apr-04	Yes	Yes	Yes	Yes
Canada	27-Nov-95	Yes	Yes	No	No
Croatia	18-Nov-96	Yes	Yes	Yes	Yes
Cyprus	26-Nov-97	Yes	Yes	Yes	Yes
Czech Republic	11-Nov-96	Yes	Yes	Yes	Yes
Denmark	21-Jun-95	Yes	Yes	Yes	Yes
Egypt	26-Aug-97	Yes	Yes	Yes	Yes
Ethiopia	17-Mar-04	Yes	Yes	Yes	Yes
Finland	26-May-95	Yes	Yes	Yes	Yes
France	08-Nov-93	Yes	Yes	Yes	Yes
Germany	25-Jan-73	Yes	No	Yes	No
Ghana	02-Nov-04	Yes	Yes	Yes	Yes
Greece	19-Nov-98	Yes	Yes	Yes	Yes
Grenada	06-Aug-60	Yes	No	Yes	No
Hungary	04-Mar-94	Yes	Yes	Yes	Yes
India	04-Dec-96	Yes	Yes	Yes	Yes
Indonesia	15-Jul-97	Yes	Yes	Yes	Yes
Iran	03-Nov-97	Yes	Yes	Yes	Yes
Ireland	07-Oct-97	Yes	Yes	Yes	Yes

Country	*Use of information*		UN Model Methods used
	Use information only for such purposes	**Disclosure specifically permitted in court proceedings and judicial decisions**	**Methods and techniques to exchange information**
Algeria	Yes	Yes	No
Australia	Yes	Yes	No
Austria	Yes	Yes	No
Belarus	Yes	Yes	No
Belgium	Yes	Yes	No
Botswana	Yes	Yes	No
Brazil	Yes	No	No
Bulgaria	Yes	Yes	No
Canada	No	No	No
Croatia	Yes	Yes	No
Cyprus	Yes	Yes	No
Czech Republic	Yes	Yes	Yes
Denmark	Yes	Yes	No
Egypt	Yes	Yes	No
Ethiopia	Yes	Yes	No
Finland	Yes	Yes	No
France	Yes	Yes	No
Germany	No	No	No
Ghana	Yes	Yes	No
Greece	Yes	Yes	No
Grenada	No	No	No
Hungary	Yes	Yes	No
India	Yes	Yes	No
Indonesia	Yes	Yes	No
Iran	Yes	Yes	No
Ireland	Yes	Yes	No

Country	Conclusion date	2008 OECD Model - Paragraph 2			
		Secrecy:		*Disclosure permitted to persons concerned with:*	
		Information treated as secret	**In accordance with domestic laws of requested State**	**Assessment and Collection**	**Enforcement, prosecution and determination of appeals or oversight**
Israel	10-Feb-78	Yes	No	Yes	No
Italy	16-Nov-95	Yes	Yes	Yes	Yes
Japan	07-Mar-97	Yes	Yes	Yes	Yes
Korea	07-Jul-95	Yes	Yes	Yes	Yes
Kuwait	17-Feb-04	Yes	Yes	Yes	Yes
Lesotho	24-Oct-95	Yes	Yes	Yes	Yes
Luxembourg	23-Nov-98	Yes	Yes	Yes	Yes
Malawi	03-May-71	Yes	No	Yes	No
Malaysia	26-Jul-05	Yes	No	Yes	Yes
Malta	16-May-97	Yes	Yes	Yes	Yes
Mauritius	05-Jul-96	Yes	Yes	Yes	Yes
Mozambique	18-Sep-07	Yes	Yes	Yes	Yes
Namibia	18-May-98	Yes	Yes	Yes	Yes
Netherlands	15-Mar-71	Yes	No	Yes	No
Netherlands (Renegotiated)	10-Oct-05	Yes	Yes	Yes	Yes
New Zealand	06-Feb-02	Yes	Yes	Yes	Yes
Norway	12-Feb-96	Yes	Yes	Yes	Yes
Oman	09-Oct-02	Yes	Yes	Yes	Yes
Pakistan	26-Jan-98	Yes	Yes	Yes	Yes
Peoples' Republic of China	25-Apr-00	Yes	Yes	Yes	Yes
Poland	10-Nov-93	Yes	Yes	Yes	No
Republic of Taiwan	14-Feb-94	Yes	No	Yes	Yes
Romania	12-Nov-93	Yes	No	Yes	Yes
Russian Federation	27-Nov-95	Yes	No	Yes	Yes
Rwanda	05-Dec-02	Yes	Yes	Yes	Yes

Country	*Use of information*		UN Model Methods used
	Use information only for such purposes	**Disclosure specifically permitted in court proceedings and judicial decisions**	**Methods and techniques to exchange information**
Israel	No	No	No
Italy	Yes	Yes	Yes
Japan	Yes	Yes	No
Korea	Yes	Yes	No
Kuwait	Yes	Yes	No
Lesotho	Yes	Yes	Yes
Luxembourg	Yes	Yes	No
Malawi	No	No	No
Malaysia	Yes	Yes	No
Malta	Yes	Yes	No
Mauritius	Yes	Yes	Yes
Mozambique	Yes	Yes	No
Namibia	Yes	Yes	No
Netherlands	No	No	No
Netherlands (Renegotiated)	Yes	Yes	No
New Zealand	Yes	Yes	No
Norway	Yes	Yes	No
Oman	Yes	Yes	No
Pakistan	Yes	Yes	No
Peoples' Republic of China	Yes	Yes	No
Poland	Yes	Yes	No
Republic of Taiwan	No	No	No
Romania	No	No	No
Russian Federation	No	No	No
Rwanda	Yes	Yes	No

Country	Conclusion date	2008 OECD Model - Paragraph 2			
		Secrecy:		*Disclosure permitted to persons concerned with:*	
		Information treated as secret	**In accordance with domestic laws of requested State**	**Assessment and Collection**	**Enforcement, prosecution and determination of appeals or oversight**
Seychelles	26-Aug-98	Yes	Yes	Yes	Yes
Sierra Leone	06-Aug-60	Yes	No	Yes	No
Singapore	23-Dec-96	Yes	Yes	Yes	Yes
Slovak Republic	28-May-98	Yes	Yes	Yes	Yes
Spain	29-Jun-06	Yes	Yes	Yes	Yes
Swaziland	23-Jan-04	Yes	Yes	Yes	Yes
Sweden	24-May-95	Yes	Yes	Yes	Yes
Switzerland	03-Jul-67	N/A	N/A	N/A	N/A
Tanzania	22-Sep-05	Yes	Yes	Yes	Yes
Thailand	12-Feb-96	Yes	Yes	Yes	Yes
Tunisia	02-Feb-99	Yes	Yes	Yes	Yes
Turkey	03-Mar-05	Yes	Yes	Yes	Yes
Uganda	27-May-97	Yes	Yes	Yes	Yes
Ukraine	28-Aug-03	Yes	No	Yes	Yes
United Kingdom	04-Jul-02	Yes	No	Yes	Yes
United States of America	17-Feb-97	Yes	Yes	Yes	Yes
Zambia	22-May-56	Yes	No	Yes	No
Zimbabwe	10-Jun-65	Yes	No	Yes	No

Country			UN Model
	Use of information		Methods used
	Use information only for such purposes	Disclosure specifically permitted in court proceedings and judicial decisions	Methods and techniques to exchange information
Seychelles	Yes	Yes	Yes
Sierra Leone	No	No	No
Singapore	Yes	Yes	No
Slovak Republic	Yes	Yes	Yes
Spain	Yes	Yes	No
Swaziland	Yes	Yes	No
Sweden	Yes	Yes	Yes
Switzerland	N/A	N/A	N/A
Tanzania	Yes	Yes	Yes
Thailand	Yes	Yes	Yes
Tunisia	Yes	Yes	No
Turkey	Yes	Yes	No
Uganda	Yes	Yes	No
Ukraine	Yes	Yes	No
United Kingdom	Yes	Yes	No
United States of America	Yes	Yes	No
Zambia	No	No	No
Zimbabwe	No	No	No

APPENDIX K

SOUTH AFRICAN DTAS – EXCHANGE OF INFORMATION ARTICLE ANALYSIS – PART 3

Country	Conclusion date	USA Model	USA Model
		Type of information	Entry of officials
		in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts and writings)	allow representatives of the applicant State to enter the requested State to interview individuals and examine books and records with the consent of the persons subject to examination
Algeria	28-Apr-98	No	No
Australia	01-Jul-99	No	No
Austria	04-Mar-96	No	No
Belarus	18-Sep-02	No	No
Belgium	01-Feb-95	No	No
Botswana	07-Aug-03	No	No
Brazil	08-Nov-03	No	No
Bulgaria	29-Apr-04	No	No
Canada	27-Nov-95	Yes	No
Croatia	18-Nov-96	No	No
Cyprus	26-Nov-97	No	No
Czech Republic	11-Nov-96	No	No
Denmark	21-Jun-95	No	No
Egypt	26-Aug-97	No	No
Ethiopia	17-Mar-04	No	No
Finland	26-May-95	No	No
France	08-Nov-93	No	No
Germany	25-Jan-73	No	No
Ghana	02-Nov-04	No	No
Greece	19-Nov-98	No	No
Grenada	06-Aug-60	No	No
Hungary	04-Mar-94	No	No
India	04-Dec-96	No	No
Indonesia	15-Jul-97	No	No

Country	2008 OECD Model - Paragraph 3		
	No obligation to:		
	to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State	**to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State**	**to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*)**
Algeria	Yes	Yes	Yes
Australia	Yes	Yes	Yes
Austria	Yes	Yes	Yes
Belarus	Yes	Yes	Yes
Belgium	Yes	Yes	Yes
Botswana	Yes	Yes	Yes
Brazil	Yes	Yes	Yes
Bulgaria	Yes	Yes	Yes
Canada	Yes	Yes	Yes
Croatia	Yes	Yes	Yes
Cyprus	Yes	Yes	Yes
Czech Republic	Yes	Yes	Yes
Denmark	Yes	Yes	Yes
Egypt	Yes	Yes	Yes
Ethiopia	Yes	Yes	Yes
Finland	Yes	Yes	Yes
France	Yes	Yes	Yes
Germany	Yes	Yes	Yes
Ghana	Yes	Yes	Yes
Greece	Yes	Yes	Yes
Grenada	No	Yes	Yes
Hungary	Yes	Yes	Yes
India	Yes	Yes	Yes
Indonesia	Yes	Yes	Yes

Country	Conclusion date	USA Model	USA Model
		Type of information	Entry of officials
		in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts and writings)	allow representatives of the applicant State to enter the requested State to interview individuals and examine books and records with the consent of the persons subject to examination
Iran	03-Nov-97	No	No
Ireland	07-Oct-97	No	No
Israel	10-Feb-78	No	No
Italy	16-Nov-95	No	No
Japan	07-Mar-97	No	No
Korea	07-Jul-95	No	No
Kuwait	17-Feb-04	No	No
Lesotho	24-Oct-95	No	No
Luxembourg	23-Nov-98	No	No
Malawi	03-May-71	No	No
Malaysia	26-Jul-05	No	No
Malta	16-May-97	No	No
Mauritius	05-Jul-96	No	No
Mozambique	18-Sep-07	No	No
Namibia	18-May-98	No	No
Netherlands	15-Mar-71	No	No
Netherlands (Renegotiated)	10-Oct-05	No	No
New Zealand	06-Feb-02	No	No
Norway	12-Feb-96	No	No
Oman	09-Oct-02	No	No
Pakistan	26-Jan-98	No	No
Peoples' Republic of China	25-Apr-00	No	No
Poland	10-Nov-93	No	No
Republic of Taiwan	14-Feb-94	No	No
Romania	12-Nov-93	No	No
Russian Federation	27-Nov-95	No	No
Rwanda	05-Dec-02	No	No

Country	2008 OECD Model - Paragraph 3		
	No obligation to:		
	to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State	**to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State**	**to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*)**
Iran	Yes	Yes	Yes
Ireland	Yes	Yes	Yes
Israel	Yes	Yes	Yes
Italy	Yes	Yes	Yes
Japan	Yes	Yes	Yes
Korea	Yes	Yes	Yes
Kuwait	Yes	Yes	Yes
Lesotho	Yes	Yes	Yes
Luxembourg	Yes	Yes	Yes
Malawi	No	Yes	Yes
Malaysia	Yes	Yes	Yes
Malta	Yes	Yes	Yes
Mauritius	Yes	Yes	Yes
Mozambique	Yes	Yes	Yes
Namibia	Yes	Yes	Yes
Netherlands	Yes	Yes	Yes
Netherlands (Renegotiated)	Yes	Yes	Yes
New Zealand	Yes	Yes	Yes
Norway	Yes	Yes	Yes
Oman	Yes	Yes	Yes
Pakistan	Yes	Yes	Yes
Peoples' Republic of China	Yes	Yes	Yes
Poland	Yes	Yes	Yes
Republic of Taiwan	Yes	Yes	Yes
Romania	Yes	Yes	Yes
Russian Federation	Yes	Yes	Yes
Rwanda	Yes	Yes	Yes

Country	**Conclusion date**	**USA Model**	**USA Model**
		Type of information	**Entry of officials**
		in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts and writings)	**allow representatives of the applicant State to enter the requested State to interview individuals and examine books and records with the consent of the persons subject to examination**
Seychelles	26-Aug-98	No	No
Sierra Leone	06-Aug-60	No	No
Singapore	23-Dec-96	No	No
Slovak Republic	28-May-98	No	No
Spain	29-Jun-06	No	No
Swaziland	23-Jan-04	No	No
Sweden	24-May-95	No	No
Switzerland	03-Jul-67	No	No
Tanzania	22-Sep-05	No	No
Thailand	12-Feb-96	No	No
Tunisia	02-Feb-99	No	No
Turkey	03-Mar-05	No	No
Uganda	27-May-97	No	No
Ukraine	28-Aug-03	No	No
United Kingdom	04-Jul-02	No	No
United States of America	17-Feb-97	Yes	Yes
Zambia	22-May-56	No	No
Zimbabwe	10-Jun-65	No	No

Country	2008 OECD Model - Paragraph 3		
	No obligation to:		
	to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State	**to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State**	**to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*)**
Seychelles	Yes	Yes	Yes
Sierra Leone	No	Yes	Yes
Singapore	Yes	Yes	Yes
Slovak Republic	Yes	Yes	Yes
Spain	Yes	Yes	Yes
Swaziland	Yes	Yes	Yes
Sweden	Yes	Yes	Yes
Switzerland	N/A	N/A	N/A
Tanzania	Yes	Yes	Yes
Thailand	Yes	Yes	Yes
Tunisia	Yes	Yes	Yes
Turkey	Yes	Yes	Yes
Uganda	Yes	Yes	Yes
Ukraine	Yes	Yes	Yes
United Kingdom	Yes	Yes	Yes
United States of America	Yes	Yes	Yes
Zambia	No	Yes	Yes
Zimbabwe	No	Yes	Yes

APPENDIX L

SOUTH AFRICAN DTAS – EXCHANGE OF INFORMATION ARTICLE ANALYSIS – PART 4

Country	Conclusion date	2008 OECD Model - Paragraph 4	
		Usefulness of information for requested State	
		State must use information gathering functions if information requested by other State even if requested State does not require the information - see also USA Model	**Cannot deny information purely because requested State does not require that information**
Algeria	28-Apr-98	No	No
Australia	01-Jul-99	Yes	Yes
Austria	04-Mar-96	No	No
Belarus	18-Sep-02	No	No
Belgium	01-Feb-95	No	No
Botswana	07-Aug-03	No	No
Brazil	08-Nov-03	No	No
Bulgaria	29-Apr-04	No	No
Canada	27-Nov-95	No	No
Croatia	18-Nov-96	No	No
Cyprus	26-Nov-97	No	No
Czech Republic	11-Nov-96	No	No
Denmark	21-Jun-95	No	No
Egypt	26-Aug-97	No	No
Ethiopia	17-Mar-04	No	No
Finland	26-May-95	No	No
France	08-Nov-93	No	No
Germany	25-Jan-73	No	No
Ghana	02-Nov-04	No	No

Country	2008 OECD Model - Paragraph 5 / USA Model - Paragraph 3 (first sentence)	Additional comments
	Financial institution restrictions	
	Cannot deny information solely because held by a financial institution or because it relates to ownership interests	
Algeria	No	
Australia	Yes	2008 Protocol substituted the article. Only taxes per Convention are included, but a new paragraph is inserted in Article 2 (Taxes Covered) to include all Australian and South African taxes.
Austria	No	
Belarus	No	
Belgium	No	
Botswana	No	
Brazil	No	
Bulgaria	No	
Canada	No	
Croatia	No	
Cyprus	No	
Czech Republic	No	
Denmark	No	
Egypt	No	
Ethiopia	No	
Finland	No	
France	No	
Germany	No	Disclosure also limited to those competent authorities involved in application of the DTA including judicial determinations.
Ghana	No	

Country	Conclusion date	2008 OECD Model - Paragraph 4	
		Usefulness of information for requested State	
		State must use information gathering functions if information requested by other State even if requested State does not require the information - see also USA Model	**Cannot deny information purely because requested State does not require that information**
Greece	19-Nov-98	No	No
Grenada	06-Aug-60	No	No
Hungary	04-Mar-94	No	No
India	04-Dec-96	No	No
Indonesia	15-Jul-97	No	No
Iran	03-Nov-97	No	No
Ireland	07-Oct-97	No	No
Israel	10-Feb-78	No	No
Italy	16-Nov-95	No	No
Japan	07-Mar-97	No	No
Korea	07-Jul-95	No	No
Kuwait	17-Feb-04	No	No
Lesotho	24-Oct-95	No	No
Luxembourg	23-Nov-98	No	No
Malawi	03-May-71	No	No
Malaysia	26-Jul-05	No	No
Malta	16-May-97	No	No
Mauritius	05-Jul-96	No	No
Mozambique	18-Sep-07	No	No
Namibia	18-May-98	No	No
Netherlands	15-Mar-71	No	No

Country	2008 OECD Model - Paragraph 5 / USA Model - Paragraph 3 (first sentence)	Additional comments
	Financial institution restrictions	
	Cannot deny information solely because held by a financial institution or because it relates to ownership interests	
Greece	No	
Grenada	No	Similar basis to what became the 1963 OECD Model and the 1981 UN Model.
Hungary	No	Additional text: "The information received will be treated as secret on request of the Contracting State giving the information".
India	No	
Indonesia	No	
Iran	No	
Ireland	No	
Israel	No	
Italy	No	
Japan	No	
Korea	No	
Kuwait	No	
Lesotho	No	
Luxembourg	No	
Malawi	No	Essentially contains same information as 1963 OECD Model plus prevention of fiscal evasion and statutory avoidance provisions per (later) 1980 UN Model
Malaysia	No	
Malta	No	
Mauritius	No	
Mozambique	No	
Namibia	No	
Netherlands	No	Information limited to that available to the competent authority of the requested State.

Country	Conclusion date	2008 OECD Model - Paragraph 4	
		Usefulness of information for requested State	
		State must use information gathering functions if information requested by other State even if requested State does not require the information - see also USA Model	**Cannot deny information purely because requested State does not require that information**
Netherlands (Renegotiated)	10-Oct-05	Yes	Yes
New Zealand	06-Feb-02	No	No
Norway	12-Feb-96	No	No
Oman	09-Oct-02	No	No
Pakistan	26-Jan-98	No	No
Peoples' Republic of China	25-Apr-00	No	No
Poland	10-Nov-93	No	No
Republic of Taiwan	14-Feb-94	No	No
Romania	12-Nov-93	No	No
Russian Federation	27-Nov-95	No	No
Rwanda	05-Dec-02	No	No
Seychelles	26-Aug-98	No	No
Sierra Leone	06-Aug-60	No	No
Singapore	23-Dec-96	No	No
Slovak Republic	28-May-98	No	No
Spain	29-Jun-06	No	No

Country	2008 OECD Model - Paragraph 5 / USA Model - Paragraph 3 (first sentence)	Additional comments
	Financial institution restrictions	
	Cannot deny information solely because held by a financial institution or because it relates to ownership interests	
Netherlands (Renegotiated)	Yes	Plus: "The Contracting States may release to the arbitration board, established under the provisions of paragraph 5 of Article 26, such information as is necessary for carrying out the arbitration procedure. The members of the arbitration board shall be subject to the limitations on disclosure described in paragraph 2 of this Article with respect to any information so released".
New Zealand	No	
Norway	No	
Oman	No	
Pakistan	No	
Peoples' Republic of China	No	
Poland	No	
Republic of Taiwan	No	
Romania	No	
Russian Federation	No	
Rwanda	No	
Seychelles	No	
Sierra Leone	No	Similar basis to what became the 1963 OECD Model and the 1981 UN Model.
Singapore	No	
Slovak Republic	No	
Spain	No	

Country	Conclusion date	2008 OECD Model - Paragraph 4	
		Usefulness of information for requested State	
		State must use information gathering functions if information requested by other State even if requested State does not require the information - see also USA Model	**Cannot deny information purely because requested State does not require that information**
Swaziland	23-Jan-04	No	No
Sweden	24-May-95	No	No
Switzerland	03-Jul-67	N/A	N/A
Tanzania	22-Sep-05	No	No
Thailand	12-Feb-96	No	No
Tunisia	02-Feb-99	No	No
Turkey	03-Mar-05	No	No
Uganda	27-May-97	No	No
Ukraine	28-Aug-03	No	No
United Kingdom	04-Jul-02	No	No
United States of America	17-Feb-97	Yes	No
Zambia	22-May-56	No	No
Zimbabwe	10-Jun-65	No	No

Country	2008 OECD Model - Paragraph 5 / USA Model - Paragraph 3 (first sentence)	Additional comments
	Financial institution restrictions	
	Cannot deny information solely because held by a financial institution or because it relates to ownership interests	
Swaziland	No	
Sweden	No	
Switzerland	N/A	
Tanzania	No	
Thailand	No	UN Model (para 1 last sentence) included as a separate paragraph concerning methods employed.
Tunisia	No	
Turkey	No	
Uganda	No	
Ukraine	No	
United Kingdom	No	The DTA seems to be based on the 1977 OECD and not 2000 OECD as the article does not apply despite Article 2 (Taxes Covered).
United States of America	No	Certain extracts from the Model excluded, most notably: (a) specific inclusion of financial institution information in the Model (Model para 3- first sentence) omitted from the DTA; (b) Requested State cannot deny information because it does not require it, is omitted from the DTA (Model para 3 - part of second sentence).
Zambia	No	Essentially contains same information as 1963 OECD Model plus prevention of fiscal evasion and statutory avoidance provisions per (later) 1980 UN Model
Zimbabwe	No	Essentially contains same information as 1963 OECD Model plus prevention of fiscal evasion and statutory avoidance provisions per (later) 1980 UN Model

BIBLIOGRAPHY

PUBLISHED AND ONLINE WORKS

2007. *The FA Report and Financial Statements.* [Online]. Available: http://www.thefa.com/TheFA/~/media/Files/PDF/TheFA/FAReport_FinancialStatements2007.ashx [6 April 2009]

Aigner, M. 2007. Administrative Burdens for Non-resident Artistes and Sportsmen in the light of Non-discrimination Clauses. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 405 – 420.)

Arnold, B.J. 2004. *Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Avery-Jones, J.F. 2001. *The "One True Meaning" of a Tax Treaty.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Avery-Jones, J.F. 2002. *The Effect of Changes in the OECD Commentaries after a Treaty is Concluded.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Bacchetta, P. and M. Paz Espinosa. 2000. Exchange-of-Information Clauses in International Tax Treaties. *International Tax and Public Finance*, 7(3): 275-293

Baker, P. 2004. The World-Wide Response to the Harmful Tax Competition Campaigns. *GITC Review*, III(2): 1-42 [Online]. Available at: http://www.taxbar.com/documents/world-wide_response_000.pdf [16 May 2009]

Betten, R. 2004. *The Avoidance of the International Double Taxation of Sportspersons.* [Online]. Available: http://www.sportslaw.nl/documents/cms_sports_id59_1_ISLJ_2004-1-2Def.5.pdf [17 January 2007]

Betten, R. (ed). 2007. *The International Guide to the Taxation of Sportsmen and Sportswomen.* The Netherlands: Nolot BV

Betten, R. 2006. Annex to the Advocate General's Conclusion on Whether or Not Art. 17 of the OECD Model Applies to the Basic Salaries of Sportsmen. *European Taxation*, 46(5): 231-236

Betten, R. 2005. Netherlands Ice Skater not Eligible for Relief for Foreign Training Days – Decision No. 03/04112 of the Court of Appeal of Amsterdam of 6 October 2004. *European Taxation*, 45(6): 259-262

Bird, R. and Zolt, E. 2008. Technology and taxation in developing countries: from hand to mouse. *National Tax Journal*, 61(4): 791-821

Bláha, J. 2007. Treatment of "Training Activities" for Artistes and Sportsmen according to the OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 115 – 136.)

Bramo, T. 2007. The Notion of "Income" in the Sense of Art. 17 OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 71 – 90.)

Brinkman, P. 2007. De Minimis Clause According to the US Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 349 – 368.)

Claassen, R.D. 2007. *Dictionary of Legal Words and Phrases.* Durban, South Africa: LexisNexis Butterworths.

Clegg, D. & Stretch, R. 2007. *Income Tax in South Africa.* Durban, South Africa: LexisNexis Butterworths.

Conway, K.G. 2009. *Taxation information exchange agreements.* BNA International Inc. [Online]. Available at: http://www.hostref4.com_nxt_gateway.dll_European%20Tax%20Service_new_19566_new_20975_new_20976_new_22516?f=templates$fn=document-frame.htm$3.0 [13 May 2009]

Danis, J. 2007. Treatment of Income from Inaction of Artistes and Sportsmen according to the OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 91 – 114.)

Dayananda, H. 2008. *The rise of Tax Information Exchange Agreements*. BNA International Inc. [Online]. Available (from trial database): http://www.hostref4.com_nxt_gateway.dll_European%20Tax%20Service_new_19566_new_19567_new_19773_new_20450?f=templates$fn=document-frame.htm$3.0$q=%5Brank%3A%5Bsum%3A%5Bstem%3Aexhange%5D%5Bstem%3Aof%5D%5Bstem%3Ainformation%5D%5D%5D$uq=$x=server$up=1#LPHit1 [13 May 2009]

De Broe, L. 2007. Belgium's Tax Treaty Policy and the Draft Belgian Model Convention. *Bulletin for International Tax,* 8/9: 322-336.

De Koker, A.P. (ed). 2007. *Silke on South African Income Tax.* Durban, South Africa: LexisNexis Butterworths.

Dison, L. 1976. The Contra Fiscum Rule in Theory and Practice. *South African Law Journal.* (2):159

Eggert, W. and M. Kolmar. 2002. Residence-Based Capital Taxation in a Small Open Economy: Why Information is Voluntarily Exchanged and Why it is Not. *International Tax and Public Finance*, 9(4): 465-482

Ellis, M.J. 2000. *The Influence of the OECD Commentaries on Treaty Interpretation – Response to Prof Dr Klaus Vogel.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Ellis, M.J. 2005. *The Judiciary and the OECD Model Tax Convention and its Commentaries – Response to Mr Justice van Brunschot.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Ellis, M.J. 2006. *The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Emslie, T.S., Davis, D.M. and S.J. Hutton. 1995. *Income Tax – Cases and Materials.* 2nd ed. Cape Town, South Africa: The Taxpayer

Engelen, F. 2004. *Interpretation of Tax Treaties under International Law.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation.

Engelen, F. 2006. *Some Observations on the Legal Status of the Commentaries on the OECD Model.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation.

Eskinazi, R. 2005. South African Branch Report – Source and Residence. *Cahiers de droit fiscal international,* 90a: 571-598

Eskinazi, R. 1993. South African Branch Report – Interpretation of Double Taxation Conventions. *Cahiers de droit fiscal international,* LXXVIIIa: 545-558

Felderer, D. 2007. Taxation of Artistic and Athletic Performance under Art. 17(2) OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 269 – 300.)

Foltea, V. 2006. *Treaty between Moldova and Israel – details.* [Online]. Available (by subscription): http://80-ip-online2.ibfd.org.ezproxy.uct.ac.za:2048/tns/ [16 January 2007]

Gangemi, B. 1990. General Report – International mutual assistance through exchange of information. *Cahiers de droit fiscal international,* LXXVb: 19-55

Gnoth, B. 2007. Taxation of Other Income of Artistes and Sportsmen at Interposition of a Company according to the OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 301 – 323.)

Graetz, M.J. 2003. *Foundations of International Income Taxation.* New York: Foundation Press

Haase, F. 2008. *Taxing Non-Resident Artists, Sportsmen and Journalists in Germany – A Brief Outline of the Status quo.* BNA International Inc. [Online]. Available at: http://www.hostref4.com_nxt_gateway.dll_European%20Tax%20Service_new_19602_new_19603_45017?f=templates$fn=document-frame.htm$3.0$q=%5Brank,100%3A%5Bdomain%3A%5Band%3A%5Bstem%3A%5Borderedprox,0%3Aexchange%20of%20information%5D%5D%5D%5D%5Bsum%3A%5Bstem%3A%5Borderedprox,0%3Aexchange%20of%20information%5D%5D%5D%5D$uq=$x=server$up=1#LPHit1 [13 May 2009]

Hattingh, J. & Newton, B. 2006. South African Branch Report – The attribution of profits to permanent establishments. *Cahiers de droit fiscal international,* 91b: 555-578

Hawabhay , K. 2003. *Revisiting Mauritius/South Africa Double Tax Avoidance Treaty.* BNA International Inc. [Online]. Available at: http://www.hostref4.com_nxt_gateway.dll_Review_12422_13965_13966_13976?f=templates$fn=document-frame.htm$3.0$q=%5Brank,100%3A%5Bdomain%3A%5Band%3A%5Bstem%3A%5Borderedprox,0%3Aexchange%20of%20information%5D%5D%5D%5D%5Bsum%3A%5Bstem%3A%5Borderedprox,0%3Aexchange%20of%20information%5D%5D%5D%5D$uq=$x=server$up=1#LPHit1 [13 May 2009]

Hay, R. 2003. *A Level Playing Field for Tax Information Exchange?* BNA International Inc. [Online]. Available at: http://www.hostref4.com_nxt_gateway.dll_Review_12422_17196_17197_17200?f=templates$fn=document-frame.htm$3.0$q=%5Brank%3A%5Bsum%3A%5Bstem%3Aexhange%5D%5Bstem%3Aof%5D%5Bstem%3Ainformation%5D%5D%5D$uq=$x=server$up=1#LPHit1 [13 May 2009]

Hay, R. 2006. *OECD Level Playing Field Report Released: Consensus or Conflict?* BNA International Inc. [Online]. Available at: http://www.hostref4.com_nxt_gateway.dll_Review_32945_36054_36060_36061?f=templates$fn=document-frame.htm$3.0$q=%5Brank%3A%5Bsum%3A%5Bstem%3Aexhange%5D%5Bstem%3Aof%5D%5Bstem%3Ainformation%5D%5D%5D$uq=$x=server$up=1#LPHit1 [13 May 2009]

Holmes, K. 2007. *International Tax Policy and Double Tax Treaties – An introduction to Principles and Application.* Amsterdam: International Bureau for Fiscal Documentation.

How Tek, T. & Jimmy, O. 2009. Taxation of Artistes and Sportsmen under Singapore's Domestic Law and its Tax Treaties. *Bulletin for International Taxation,* 63(1): 11-21.

IBFD. 1999. *Netherlands – Further bill on tax changes for year 2000 submitted to parliament.* [Online]. Available (by subscription): http://80-ip-online2.ibfd.org.ezproxy.uct.ac.za:2048/tns/ [16 January 2007]

IBFD. 2000. *Zambia – Budget for 2000.* [Online]. Available (by subscription): http://80-ip-online2.ibfd.org.ezproxy.uct.ac.za:2048/tns/ [16 January 2007]

IBFD. 2006a. *Netherlands – Budget for 2007 - details.* [Online]. Available (by subscription): http://80-ip-online2.ibfd.org.ezproxy.uct.ac.za:2048/tns/ [16 January 2007]

IBFD. 2006b. *Treaty between Albania and Serbia and Montenegro – details.* [Online]. Available (by subscription): http://80-ip-online2.ibfd.org.ezproxy.uct.ac.za:2048/tns/ [16 January 2007]

IBFD. 2006c. *Treaty between Slovinia and India – details.* [Online]. Available (by subscription): http://80-ip-online2.ibfd.org.ezproxy.uct.ac.za:2048/tns/ [16 January 2007]

Juárez, A. 2003. Limitations to the Cross-Border Taxation of Artistes and Sportsmen under the Look-Through Approach in Article 17(1) of the OECD Model Convention (Part I). *European Taxation*, 43(11): 409-419

Juárez, A. 2003. Limitations to the Cross-Border Taxation of Artistes and Sportsmen under the Look-Through Approach in Article 17(1) of the OECD Model Convention (Part II). *European Taxation*, 43(12): 457-472

Jau, M. 2007. "Star Companies" in International Tax Law. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 247 – 268.)

Jenssen, O. 2007. Non-discrimination Issues of Artistes and Sportsmen in the light of Article 24 OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 371 – 388.)

Keen, M. and Ligthart, J. E. 2005. *Revenue Sharing and Information Exchange under Non-Discriminatory Taxation* (June 2005). CentER Discussion Paper No. 2005-69. Available at SSRN: http://ssrn.com/abstract=756370

Keen, M. and J. E. Ligthart. 2006. Information Sharing and International Taxation: A Primer. *International Tax and Public Finance*, 13(1): 81-110

Keen, M. and J. E. Ligthart. 2006a. Incentives and Information Exchange in International Tax. *International Tax and Public Finance*, 13(2): 163-180

Krause, J. and C. McLemore. 2009. *The day the havens opened up*. BNA International Inc. [Online]. Available (from trial database): http://www.hostref4.com_nxt_gateway.dll_European%20Tax%20Service_new_19547_new_21338_new_21344_new_22505?f=templates$fn=document-frame.htm$3.0$q=%5Brank%3A%5Bsum%3A%5Bstem%3Aexhange%5D%5Bstem%3Aof%5D%5Bstem%3Ainformation%5D%5D%5D$uq=$x=server$up=1#LPHit1 [13 May 2009]

Kreisl, R. 2007. Treatment of Artistic Income where there is no Public Performance according to the OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 137 – 158.)

Kruger, D. and W. Scholtz. 2003. *Broomberg on Tax Strategy.* 4th ed. Durban, South Africa: LexisNexis Butterworths.

Lang, M. 2005. *"Taxes Covered" – What is a "tax" according to Article 2 of the OECD Model?* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Lang, M. (ed). 2001. *Tax Treaty Interpretation.* The Hague, The Netherlands: Kluwer Law International

Lang, M. 2000. *The Application of the OECD Model Tax Convention to Partnerships – A Critical Analysis of the Report Prepared by the OECD Committee on Fiscal Affairs.* The Hague, The Netherlands: Kluwer Law International

Lawson, E. and J. Mills. 2005. *Agassi Triumphs in UK Court of Appeal.* [Online]. Available: http://www.sportslaw.nl/documents/cms_sports_id79_1_ISLJ_2005-1-2.pdf [17 January 2007]

Lloyd-Pugh, T. and McMahon, J. 2002. Taxation in Australia of Non-Resident Athletes: Maurice Greene and the Olympic Games: Can the ATO catch the fastest man in the world? *Revenue Law Journal,* 12: 128-144

Maisto, G. 2005. *The Observations on the OECD Commentaries in the Interpretation of Tax Treaties.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Malin, A. 2007. Employed Artistes and Sportsmen according to the OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 227 – 243.)

Martin Jiménez, A.J. 2004. *The 2003 Revision of the OECD Commentaries on the Improper Use of Tax Treaties: A Case for the Declining Effect of the OECD Commentaries?* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Martin Jiménez, A.J. 2005. *Defining the Objective Scope of Income Tax Treaties: The Impact of Other Treaties and EC Law on the Concept of Tax in the OECD Model.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Merriam-Webster's Online Dictionary. 2008. Merriam-Webster Online.

Meyerowitz, D. 2008. *Meyerowitz on Income Tax.* Cape Town, South Africa: The Taxpayer

Meyerowitz, D. 2008. *Meyerowitz on Income Tax – Double Taxation Agreements.* Cape Town, South Africa: The Taxpayer.

Molenaar, D. 2002. *Obstacles for International Performing Artists.* [Online]. Available: http://www.allarts.nl/articles/2002/et040203.pdf [17 January 2007]

Molenaar, D. & Grams, H. 2003. *Decision in the Arnoud Gerritse Case.* [Online]. Available: http://www.allarts.nl/artikelen/2003/Gerritse%20-%20decision.pdf [22 January 2007]

Molenaar, D. 2005a. *Taxation of International Performing Artistes – The problems with Article 17 OECD and how to correct them.* Amsterdam: International Bureau for Fiscal Documentation.

Molenaar, D. 2005b. *The illusions of international artiste and sportsman taxation.* [Online]. Available: http://www.allarts.nl/articles/2005/Illusions%20of%20artiste%20and%20sportsman%20taxation%20-%20Ellis%202005.pdf [17 January 2007]

Molenaar, D. 2005c. *Artiste Taxation and Mobility in the Cultural Sector.* [Online]. Available: [17 January 2007]

Molenaar, D. 2006a. *End of Artiste and Sportsman Taxation in 2007.* [Online]. Available: http://www.allarts.nl/articles/2006/End%20of%20Artiste%20and%20Sportsman%20Taxation%20in%202007%20-%20AA.pdf [17 January 2007]

Molenaar, D. 2006b. *Article 17 OECD Model needs to be changed.* [Online]. Available: http://www.allarts.nl/articles/2006/Article%2017%20OECD%20Model%20needs%20to%20be%20changed%20-%20IBA%20-%20maart%202006.pdf [17 January 2007]

Molenaar, D. 2006c. *European Court in the Scorpio Case: Breakthrough* . [Online]. Available: http://www.allarts.nl/articles/2006/2006-10-03%20-%20ECJ%20in%20Scorpio.pdf [22 January 2007]

Neskrabal, P. 2007. Personal Taxation of Non-resident Artistes and Sportsmen in the light of Non-discrimination Clauses. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 389 – 404.)

Nitikman, J. 2001. Article 17: An Argument for Repeal. *International Tax Review,* 12: 45-51

OECD. 1998. *Harmful Tax Competition – An Emerging Global Issue.* [Online]. Available: http://www.oecd.org/dataoecd/33/0/1904176.pdf [28 April 2009]

OECD. The Centre for Tax Policy and Administration. 2006. *The Tax Treatment of Services – Proposed Commentary Changes – Public discussion draft – 8 December 2006.* [Online]. Available: http://www.oecd.org/dataoecd/2/20/37811491.pdf

OECD. The Centre for Tax Policy and Administration. 2009. *Engaging with High Net Worth Individuals on Tax Compliance – May 2009.* [Online]. Available: www.oecd.org/dataoecd/5/25/42798312.pdf [15 June 2009]

OECD. 2006a. *Manual on the Implementation of Exchange of Information provisions for tax purposes.* [Online]. Available: http://www.oecd.org/ctp/eoi/manual

Oguttu, A. 2007. *Curbing Offshore Tax Avoidance: The Case of South African Companies and Trusts*. Pretoria: UNISA. (LLD Thesis)

Olivier, L. and M. Honiball. 2008. *International Tax – A South African Perspective.* 4th ed. Cape Town, South Africa: Siber Ink CC.

O'Shea, A. 2004. *International Law and the Bill of Rights.* Durban, South Africa: LexisNexis Butterworths.

Pocock, C. 2001. *Information Exchange*. BNA International Inc. [Online]. Available (from trial database): http://www.hostref4.com_nxt_gateway.dll_European%20Union%20Focus_1923_2036_2039_2048?f=templates$fn=document-frame.htm$3.0$q=%5Brank,100%3A%5Bdomain%3A%5Band%3A%5Bstem%3A%5Borderedprox,0%3Aexchange%20of%20information%5D%5D%5D%5D%5Bsum%3A%5Bstem%3A%5Borderedprox,0%3Aexchange%20of%20information%5D%5D%5D%5D$uq=$x=server$up=1#LPHit1 [13 May 2009]

Pracht, L. 2007. Special Issues Due to the Way of Financing Artistes and Sportsment. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 327 – 347.)

Sandler, D. 2008. Artistes and Sportsmen (Article 17 OECD Model Convention). (In Lang, M., Pistone, P., Schuch, J., & Staringer, C. (eds). *Source versus Residence – Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives*. The Hague, The Netherlands: Kluwer Law International. p. 215 – 245.)

Sandler, D. 1995. *The Taxation of International Entertainers and Athletes – All the World's a Stage.* The Hague, The Netherlands: Kluwer Law International.

Schaumburg, H. and S. Schlossmacher. 2000. *Article 26 of the OECD Model in Light of the Right to Informational Self-Determination.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Shadwick, M. 2002. *The Cayman Islands and United States: Tax Information Exchange Agreement - Is it a Sham or One-Sided?* BNA International Inc. [Online]. Available at: http://www.hostref4.com_nxt_gateway.dll_Review_4209_5068_5070_5091?f=templates$fn=document-frame.htm$3.0$q=%5Brank%3A%5Bsum%3A%5Bstem%3Aexhange%5D%5Bstem%3Aof%5D%5Bstem%3Ainformation%5D%5D%5D$uq=$x=server$up=1#LPHit1 [13 May 2009]

Sitabutr, S. 2003. *A National Soccer Team Will Be Created with an Initial Budget of 19 Million Baht.* [Online]. Available: http://nntworld.prd.go.th/previewnews.php?news_id=254608130022&news_headline=A%20National%20Soccer%20Team%20Will%20Be%20Created%20with%20an%20Initial%20Budget%20of%2019%20Million%20Baht&return=ok [6 April 2009]

Soanes, C. & Stevenson, A. (eds). 2006. *The Concise Oxford English Dictionary*. 11th ed revised. Oxford Reference Online. Oxford University Press.

Sriram, K. 2005. *The "Jock Tax": Taxation of Non Resident International Sportsmen and Athletes – Perspectives from India.* [Online]. Available: http://www.sportslaw.nl/documents/cms_sports_id79_1_ISLJ_2005-1-2.pdf [17 January 2007]

Swanney, D. 2007. Taxation of Pensions and Golden Handshakes of Artistes and Sportsmen according to the OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 181 – 206.)

UNITED NATIONS. 1980. *Vienna Convention on the Law of Treaties.* [Online]. Available: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [26 January 2007]

Valis, J. 2007. Withholding Taxes for Non-resident Artistes and Sportsmen in the light of Non-discrimination Clauses. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 421 – 437.)

Van Brunschot, F. 2005. *The Judiciary and the OECD Model Tax Convention and its Commentaries.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Van der Bruggen, E. 2003. Unless the Vienna Convention Otherwise Requires: Notes on the Relationship between Article 3(2) of the OECD Model Tax Convention and Articles 31 and 32 of the Vienna Convention on the Law of Treaties. *European Taxation,* 43(5): 142-156, May.

Vogel, K. 1997. *Klaus Vogel on Double Taxation Conventions – A Commentary to the OECD, UN and US Model Conventions for the Avoidance of Double Taxation of Income and Capital With Particular Reference to German Treaty Practice.* 3rd ed. The Hague, The Netherlands: Kluwer Law International.

Vogel, K. & Prokisch, R.G. 1993. General Report – Interpretation of Double Taxation Conventions. *Cahiers de droit fiscal international,* LXXVIIIa: 55-85

Wagner, Y. 2007. The Historical Background of Art. 17 OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 55 – 70.)

Waite, M. (ed). 2006. *The Oxford Paperback Thesaurus.* Oxford Reference Online. Oxford University Press.

Ward, D.A., Avery Jones, J.F., De Broe, L., Ellis, M.J., Killius, J., Goldberg, S.H., Le Gall, J-P., Maisto, G., Miyatake, T., Torrione, H., Van Raad, K., Wiman, B. 2005. *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model.* Amsterdam: International Bureau for Fiscal Documentation.

Ward, D.A. 2006. *The Role of the Commentaries on the OECD Model in the Tax Treaty Interpretation Process.* Amsterdam, The Netherlands: International Bureau for Fiscal Documentation

Wehrli, T. 2007. Taxation of Contract Splitting with Artistes and Sportsmen according to the OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 207 – 226.)

Williams, R.C. 2005. *Income Tax in South Africa – Cases and Materials.* 2nd ed. Durban, South Africa: LexisNexis Butterworths.

Williams, R.C. 2006. *Income Tax in South Africa – Law and Practice.* 4th ed. Durban, South Africa: LexisNexis Butterworths.

Zadek, G. 2007. Treatment of Advertising Income of Artistes and Sportsmen according to the OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 159 – 180.)

Zoubek, J. 2007. Notion of Sportsmen in Art. 17 OECD Model. (In Loukota, W. & Stefaner, M. (eds.), *Taxation of Artistes and Sportsmen in International Tax Law*, Vienna: Linde Verlag Wien. p. 35 – 54.)

MODEL DTAS

OECD. 1963. *OECD Income and Capital Model Convention (1963).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_o2_02_eng_1963_mo.html [2 October 2006]

OECD. 1963. *OECD Income and Capital Model Convention (Commentary) (1963).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_o2_02_eng_1963_cm.html [2 October 2006]

OECD. 1977. *OECD Income and Capital Model Convention (1977).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_o2_02_eng_1977_mo.html [2 October 2006]

OECD. 1977. *OECD Income and Capital Model Convention (Commentary) (1977).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_o2_02_eng_1977_cm.html [2 October 2006]

OECD. 2000. *OECD Income and Capital Model Convention (2000).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_o2_02_eng_2000_mo.html [2 October 2006]

OECD. 2000. *OECD Income and Capital Model Convention (Commentary) (2000).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_o2_02_eng_2000_cm.html [2 October 2006]

OECD. 2003. *OECD Income and Capital Model Convention and Commentary (2003).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_o2_02_eng_2003_mo.html [2 October 2006]

OECD. 2005. *OECD Income and Capital Model Convention and Commentary (2005).* [Online]. Available (by subscription): http://80-ip-online2.ibfd.org.ezproxy.uct.ac.za:2048/treaty/docs/html/tt_o2_02_eng_2005_mo_frame.htm?loadurl=/treaty/docs/html/tt_o2_02_eng_2005_mo.html [2 October 2006]

OECD. 2008. *OECD Income and Capital Model Convention and Commentary (2008).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_o2_02_eng_2008_mo.html [1 October 2008]

UN. 1980. *UN Income and Capital Model Convention (1980).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_u2_02_eng_1980_mo.html [2 October 2006]

UN. 1980. *UN Income and Capital Model Convention (Commentary) (1980).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_u2_02_eng_1980_cm.html [2 October 2006]

UN. 2001. *UN Income and Capital Model Convention (2001).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_u2_02_eng_2001_mo.html [2 October 2006]

UN. 2001. *UN Income and Capital Model Convention (Commentary) (2001).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_u2_02_eng_2001_cm.html [2 October 2006]

USA. 1981. *Model Income Tax Convention (1981).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_us_02_eng_1981_mo.html [2 October 2006]

USA. 1996. *Model Income Tax Treaty (1996).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_us_01_eng_1996_mo.html [2 October 2006]

USA. 2006. *Model Income Tax Convention (2006).* [Online]. Available (by subscription): http://ip-online2.ibfd.org/data/treaty/docs/html/tt_us_01_eng_2006_mo.html [2 October 2006]

SOUTH AFRICAN LAWS

SOUTH AFRICA. 1962. *Income Tax Act 58 of 1962.* Pretoria: Government Printer. [Laws]

SOUTH AFRICA. 1996. *Constitution of the Republic of South Africa Act, 1996.* Pretoria: Government Printer. [Laws.]

SOUTH AFRICA. 2005. *Revenue Laws Amendment Act 31 of 2005.* Pretoria: Government Printer. [Laws.]

SOUTH AFRICA. 2006. *Revenue Laws Amendment Bill 33 of 2006.* Pretoria: Government Printer. [Bills.]

SOUTH AFRICA. 2006. *Revenue Laws Amendment Act 20 of 2006.* Pretoria: Government Printer. [Laws.]

SOUTH AFRICA. 2007. *Taxation Laws Amendment Act 8 of 2007.* Pretoria: Government Printer. [Laws.]

SOUTH AFRICA. 2007. *Revenue Laws Amendment Act 35 of 2007.* Pretoria: Government Printer. [Laws.]

SOUTH AFRICA. 2008. *Taxation Laws Amendment Act 3 of 2008.* Pretoria: Government Printer. [Laws.]

SOUTH AFRICA. 2008. *Revenue Laws Amendment Act 60 of 2008.* Pretoria: Government Printer. [Laws.]

SOUTH AFRICA. 2008. *Revenue Laws Second Amendment Act 61 of 2008.* Pretoria: Government Printer. [Laws.]

EXPLANATORY MEMORANDA

SOUTH AFRICA. South African Revenue Services. 2005. *Explanatory Memorandum on the Revenue Laws Amendment Bill, 2005.* Pretoria: Government Printer.

SOUTH AFRICA. South African Revenue Services. 2006. *Explanatory Memorandum on the Revenue Laws Amendment Bill, 2006.* Pretoria: Government Printer.

INTERPRETATION NOTES

SOUTH AFRICA. South African Revenue Services. 2002. *Interpretation Note: No. 3 – Resident: Definition in relation to a natural person – ordinarily resident.* Pretoria: Government Printer.

SOUTH AFRICA. South African Revenue Services. 2006. *Interpretation Note: No. 4 – Resident: Definition in relation to a natural person –physical presence test (issue 3).* Pretoria: Government Printer.

SOUTH AFRICA. South African Revenue Services. 2002. *Interpretation Note: No.6 – Resident: Place of effective management (persons other than natural persons).* Pretoria: Government Printer.

SOUTH AFRICA. South African Revenue Services. 2008. *Interpretation Note: No.17 – Employees' tax: Independent Contractors (issue 2).* Pretoria: Government Printer.

SOUTH AFRICAN CASES

AZAPO and others v Truth and Reconciliation Commission and others (1996) 3 All SA 15 (C)

Baldwins (South Africa) Ltd v Commissioner for Inland Revenue (1961) 24 SATC 270

Cactus Investments (Pty) Ltd v Commissioner for Inland Revenue (1999) 61 SATC 43

Cohen v Commissioner for Inland Revenue (1946) 13 SATC 362

Commissioner for Inland Revenue v Black (1957) 21 SATC 226

Commissioner for Inland Revenue v Cowley (1960) 23 SATC 276

Commissioner for Inland Revenue v Delfos (1933) 6 SATC 92

Commissioner for Inland Revenue v Epstein (1954) 19 SATC 221

Commissioner for Inland Revenue v George Forest Timber (1924) 1 SATC 20

Commissioner for Inland Revenue v Kuttel (1992) 54 SATC 298

Commissioner for Inland Revenue v Lever Brother and Unilever Ltd (1946) 14 SATC 1

Commissioner for Inland Revenue v Loewenstein NO (1958) 22 SATC 249

Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd (1990) 52 SATC 9

Commissioner for Inland Revenue v Simpson (1949) 16 SATC 268

Commissioner for the South African Revenue Service v Brummeria Renaissance (Pty) Ltd and others (2007) SCA 99 (RSA)

Commissioner for the South African Revenue Service v Kotze (2002) 64 SATC 447

Commissioner for the South African Revenue Service v SA Silicone Products (Pty) Ltd (2004) 66 SATC 131

Geldenhuys v Commissioner for Inland Revenue (1947) 14 SATC 419

Government of India v Taylor (1955) 1 All ER 292

Harksen v President of the Republic of South Africa and others (2000) JOL 6307 (CC)

Isaacs v Commissioner for Inland Revenue (1949) 16 SATC 258

ITC 1735 (2002) 64 SATC 455

ITC 1675 (1998) 62 SATC 219

ITC 1572 (1993) 56 SATC 175

ITC 1544 (1992) 54 SATC 456

ITC 1503 (1990) 53 SATC 342

ITC 1510 (1989) 54 SATC 30 (Z)

ITC 1437 (1986) 50 SATC 154 (Z)

ITC 1170 (1971) 34 SATC 76

ITC 1104 (1967) 29 SATC 46

ITC 1103 (1967) 29 SATC 35

ITC 976 (1961) 24 SATC 812

ITC 837 (1957) 21 SATC 413

ITC 701 (1950) 17 SATC 108

ITC 641 (1947) 15 SATC 233

ITC 560 (1944) 13 SATC 308

ITC 396 (1937) 10 SATC 87

ITC 247 (1932) 6 SATC 379

ITC 117 (1928) 4 SATC 70

Kerguelen Sealing & Whaling Co. Ltd v CIR (1939) 10 SATC 363

Millin v Commissioner for Inland Revenue (1928) 3 SATC 170

S v Collop (1979) 4 All SA 754 (C)

S v Petane (1988) 4 All SA 88 (C)

SCB Investments (Pty) Ltd v COT (1960) 23 SATC 416

Secretary for Inland Revenue v Downing (1975) 37 SATC 249

Secretary for Inland Revenue v Silverglen Investments (Pty) Ltd (1969) 30 SATC 199

Stander v Commissioner for Inland Revenue (1997) 59 SATC 212

Tuck v Commissioner for Inland Revenue (1988) 50 SATC 98

Transvaal Associated Hide and Skin Merchants v Collector of Income Tax Botswana (1967) 29 SATC 97

Van Zyl and others v Government of the Republic of South Africa and others (2005) 4 All SA 96 (T)

WH Lategan v Commissioner for Inland Revenue (1926) 2 SATC 16

Zulu and others v Van Rensberg and others (1996) 2 All SA 615 (LCC)

FOREIGN CASES AND CASE SUMMARIES

Agassi v Robinson (Her Majesty's Inspector of Taxes) [2006] UKHL 23 [United States – United Kingdom]

Case 9 K 147/00. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/ttcls/html/cl_de_2004-11-24_1-summary.html [7 February 2009] [Germany – Austria]

Case I R 26/01. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/ttcls/html/cl_de_2001-07-18_1-summary.html [7 February 2009] [Germany – Austria]

Case I R 22/02. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/cl/ [21 February 2009] [Germany – United States]

Case 9 K 9347/97. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/ttcls/html/cl_de_2000-07-10_1-summary.html [7 February 2009] [Germany – Belgium]

Case I R 51/96. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/ttcls/html/cl_de_1997-04-08_1-summary.html [7 February 2009] [Germany – United Kingdom]

Case 8 K 3034/94. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/ttcls/html/cl_de_1995-06-30_1-summary.html [7 February 2009] [Germany – Austria]

Case 91/13/0222 in conjunction with 91/13/0203. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/ttcls/html/cl_at_1994-07-27_1-summary.html [7 February 2009] [Austria]

Case 93/15/0175. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/ttcls/html/cl_at_1994-02-23_1-summary.html [7 February 2009] [Austria – Italy]

Krabbe, H. 2007. Case 3 K 69/05. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/ttcls/html/cl_de_2007-04-26_1-summary.html [7 February 2009] [Germany – Turkey]

Krabbe, H. 1987. Case I R 306/82. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/ttcls/html/cl_de_1986-07-23_1-summary.html [23 May 2009] [Germany – Belgium]

Partington v The Attorney-General 21 LT 370 [United Kingdom]

Thomas F. Cheek v Her Majesty the Queen. [Online]. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/ttcls/html/cl_ca_2002-01-31_1-summary.html [7 February 2009] [Canada – United States]

OTHER

SOUTH AFRICA. South African Revenue Services. 2008. *Binding Private Ruling: BPR 007 - Service Fees Received by a Non-Resident Labour Broker.* Pretoria: Government Printer.

Steyn, M.T. 2007. *Interpretation of Fiscal Legislation.* Cape Town, University of Cape Town [Seminar Notes]

FOREIGN GUIDES

Australian Tax Office. 2007. *Withholding from payments to foreign residents for entertainment or sports activities*
[http://www.ato.gov.au/businesses/content.asp?doc=/content/46256.htm&pc=001/003/024/002/013&mnu=659&mfp=001/003&st=&cy=1]